TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1917.

No. [redacted] 111

EMMA T. KRUEGER, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED FEBRUARY 25, 1918.

(26,168)

(25,158)

SUPREME COURT OF THE UNITED STATES.

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EMMA T. KRUEGER, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 10, 1917.

Pleas and Proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the September Term, 1915, of said Court, Before the Honorable John E. Carland, Circuit Judge, and the Honorable Charles F. Amidon and the Honorable Arba S. Van Valkenburgh, District Judges.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court
of Appeals for the Eighth Circuit.

Be it remembered that heretofore, to-wit: on the twentieth day of March, A. D. 1915, a transcript of record pursuant to an appeal allowed by the District Court of the United States for the District of Colorado, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit in a certain cause wherein United States of America is Appellant and Emma T. Krueger is Appellee, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:

(*a*)

1 Pleas in the District Court of the United States for the District of Colorado Sitting at Denver.

Be It Remembered, that heretofore, and on, to-wit, the twenty-seventh day of April, A. D. 1914, came The United States of America by Harry E. Kelly, Esquire, district attorney, and filed in said court its bill of complaint; and sued out of and under the seal of said court a subpoena in chancery against Emma T. Krueger.

And the said bill of complaint is in words and figures as follows, to-wit:

In the District Court of the United States of America, within and for the District of Colorado.

United States of America, plaintiff,
No..... vs. In Equity.
Emma T. Krueger, Defendant.

Bill of Complaint.

To the Honorable Robert E. Lewis, Judge of the district court of the United States, within and for the district of Colorado:

The United States of America, by the Attorney General, brings this its bill, against Emma T. Krueger, a resident of the City and County of Denver in the state and district of Colorado, and for its cause of action plaintiff states:

2 1. On and prior to September 2, 1909, plaintiff was the owner in fee as a part of its public domain, of the W½ of the NE¼, Sec. 17, Tp. 5 N., R. 69 W., 6th P. M., containing 80 acres, and situated in Larimer County, state and district of Colorado, and in plaintiff's Denver, Colorado, land district, which said land was on said date unreserved, unsegregated and subject to entry and acquirement under plaintiff's public land laws, and not otherwise.

2. In accordance with an agreement with one William E. Moses, and with intent to defraud the plaintiff, one Charles M. Krueger, on or about September 2, 1909, caused the said William E. Moses to file in plaintiff's Denver, Colorado, land office, his certain application to enter said above described land, by the use of soldier's additional homestead scrip; and in furtherance of said fraud said Krueger on the same day caused one John A. McIntyre to make and file in plaintiff's

said land office a non-mineral affidavit concerning said land, both application and affidavit showing an apparent compliance with the requirements of plaintiff's laws and regulations governing soldier's additional homestead entries.

3. In said application it was falsely stated and represented that said described land was unoccupied, unimproved and unappropriated by any person claiming the same, other than the selector, William E. Moses; in said non-mineral affidavit it was falsely stated and represented that the said land was not in any manner occupied adversely to the selector, and by means of apparent compliance with said laws concerning soldier's additional homestead entries and said false statements and representations, all of which were relied upon by plaintiff's proper officers, and not otherwise, the said Charles M. Krueger fraudulently procured the issuance on April 8, 1910, of the certificate of the Register of said land office, embracing said described land, and on September 2, 1910, plaintiff's patent conveying to William E. Moses, assignee of Mary Jane Rossman, widow of William W. Rossman, deceased, the legal title thereto; who thereafter and on April 15, 1910, conveyed the same to said Charles M. Krueger, and on April 22, 1910, said Charles M. Krueger conveyed an undivided one-half interest in said land to Emma T. Krueger, his wife, and defendant herein, and the other undivided one-half interest therein to Mary N. McIntyre, the sister of said defendant, and wife of affiant in said non-mineral affidavit, and said Mary N. McIntyre thereafter and on the same day conveyed her apparent undivided one-half interest in the said land to said Emma T. Krueger, the defendant herein, who now, under and by virtue of said patent and said subsequent conveyances, and not otherwise, claims to be the full owner of all of said land; but said defendant, and each of said grantors and grantees, took said apparent title to said land with full knowledge and notice of said fraudulent procurement of said patent and gave no consideration therefor.

3

4. The statements and representations in said application and said non-mineral affidavit that the above described land was unoccupied, unimproved and unappropriated by any person claiming the same, other than the selector, and that said land was not in any manner occupied adversely to the selector, were then and there false, and were by said Charles M. Krueger, John A. McIntyre and William E. Moses then and there known and intended to be false, in that said described land was then and is now, and for several years prior to the date of said application had been in open and notorious pos-

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session of one Perry C. Benson, holding under color of title deraigned from the Denver and Pacific Railway and Telegraph Company, which company claimed under a land grant by Congress, of date July 1, 1862, all of which was to said Krueger, said McIntyre and said Moses well known at and prior to the filing of said application and said non-mineral affidavit, and said application and said non-mineral affidavit were caused to be made, procured and filed by said Charles M. Krueger with the intent on the part of him to fraudulently acquire for himself title to and the use of said described land, and to defraud the plaintiff thereof.

Wherefore, plaintiff prays:

5 1. That said patent so issued to said William E. Moses, assignee of Mary Jane Rossman, widow of William W. Rossman, deceased, and each and every subsequent conveyance and instrument affecting the title to said land and the title now held by defendant herein, be cancelled, set aside, and held for naught.

2. That defendant be held to have no interest in said land.

3. That plaintiff be decreed to be the owner of said land as a part of its public domain.

4. That plaintiff may be granted such general relief as may by the court be deemed just and equitable.

5. That plaintiff have and recover of defendant its costs herein.

JAMES C. McREYNOLDS,
Attorney General.
E. B. LACY,
Acting United States Attorney.
J. I. HOLLINGSWORTH,
Assistant United States Attorney.

Endorsed: Filed in the District Court on April 27, 1914.

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6 (Subpoena in Chancery and Marshal's Return.)

The President of the United States of America, To Emma T. Krueger—Greeting:

You are hereby commanded, that you appear before the judge of the district court of the United States, for the district of Colorado, at the city and county of Denver, in said district, twenty days from the date hereof, to answer the bill of complaint of The United States of America this day filed in the office of the clerk of said court, in said city and county

of Denver, then and there to receive and abide by such judgment and decree as shall then or thereafter be had upon said bill of complaint, upon pain of judgment being pronounced against you by default, and a decree had and entered accordingly.

To the Marshal of the district of Colorado to execute and make due return.

Witness, the Honorable Robert E. Lewis, Judge of the district court of the United States, for the district of Colorado, and the seal of the said district court, at the city and county of Denver aforesaid, this twenty-seventh day of April, in the year of our Lord one thousand nine hundred and four-
7 teen and of the Independence of the United States, the 138th year.

(Seal U. S. district court) CHARLES W. BISHOP,
Clerk.
By Albert Trego,
Deputy Clerk.

Memorandum.

The above named defendant is hereby notified that unless she shall file her answer or other defense in the office of the clerk of said court, at the city and county of Denver aforesaid, on or before the twentieth day after service, excluding the day thereof the bill of complaint may be taken pro confesso.

CHARLES W. BISHOP,
Clerk.
By Albert Trego,
Deputy Clerk.

Marshal's Return.

United States of America,
District of Colorado—ss.

Denver, Colorado, April 28, 1914.

I have duly executed the within writ by delivering to Emma T. Krueger, personally, a true copy of the within writ, at the place and time as follows, to-wit: As to the aforesaid on the 28th day of April, A. D. 1914, at Denver in said district.

This writ therefore returned executed, as the law directs, this 28th day of April, A. D. 1914.

D. C. BAILEY,
Marshal,
By E. B. Chadwick,
Deputy Marshal.

8 Endorsed: Filed in the District Court on April 30, 1914.

(Answer.) 7

Comes now the defendant above named, by her solicitors, and for answer to the bill of complaint, heretofore filed herein, says:

For A First Defense.

First. That she admits the allegations in the first paragraph of said complaint.

Second. That she denies each and every of the allegations in the second paragraph of said complaint, and says, with respect thereto, that one William E. Moses did, on or about September 2d, 1909, file in plaintiff's Denver, Colorado, land office, his certain application to enter the land described in said complaint, by the use of soldier's additional homestead [strip,] and that said William E. Moses did request one John A. McIntyre to make a certain non-mineral affidavit, and said John A. McIntyre did make the same; that said affidavit was true and correct in every detail, recital and statement therein contained, and that one Charles M. Krueger, since deceased, who was then and there the husband of this defendant, did represent said William E. Moses in the proceedings pertaining to said application, and that said Charles M. Krueger did not, with intent to defraud or otherwise, cause said application to be made, or cause said affidavit to be filed.

Third. Defendant says that she is informed and believes, and so states the fact to be, that at the time said application was made, and during the pendency thereof, said land was unoccupied, unimproved and unappropriated by any person claiming the same or otherwise, than by the said William E. Moses. And defendant is informed and believes and so states the fact to be that said land was, at the time of the filing of said non-mineral affidavit, and at all times during the pendency of said application, in no manner occupied adversely to said selector, and denies that any statements in said application or said non-mineral affidavit were false and fraudulent, and denies that said Charles M. Krueger or said William E. Moses falsely stated or represented any fact in said application or said non-mineral affidavit, or falsely or fraudulently procured the issuance of said patent; and defendant alleges that on the 15th day of April, A. D. 1910, said William E. Moses, for the sum of seven hundred and eighty dollars ($780.00) did convey said lands to said Charles M. Krueger, by deed recorded on June 21, 1910, in Book 277 at page 204 of the records in the office of the Clerk and Recorder of the County of Larimer and State of Colorado, and that on, to-

wit, the 22d day of April, A. D. 1910, said Charles M. Krueger did for valuable consideration, by good and sufficient deed, convey to Mary N. McIntyre and this defendant, and to each thereof, an undivided one-half interest therein, of the premises described in said complaint, and that this defendant had no notice, knowledge or information of any kind or character, respecting or pertaining to any statement or representation whatsoever, contained in said application or said non-mineral affidavit; that said deed to Mary N. McIntyre and Emma T. Krueger was duly recorded on June 27, 1910, in book 277 at page 217 of the records in the office of the Clerk and Recorder of said county of Larimer, state of Colorado, and this defendant denies that said Mary N. McIntyre was then or is now the sister of this defendant, and admits that said Mary N. McIntyre was then the wife of said John A. McIntyre, and this defendant further says that on, to-wit the 22d day of April, A. D. 1913, this defendant purchased from said Mary N. McIntyre an undivided one-half interest in said premises, and paid therefor, the sum of fifteen hundred dollars ($1500.-00), a good and valuable consideration, and received from said Mary N. McIntyre a good and sufficient deed, which said deed was on, to-wit, the 23d day of April, 1913, duly
11 recorded in book 310, page No. 189 of the records in the office of the clerk and recorder of the county of Larimer, state of Colorado; and this defendant says that, at the time of the payment of said money to said Mary N. McIntyre, and at the time of the execution and recording of said deed, and since hitherto, this defendant had no knowledge, information or advice that any statement made in said application for patent or said non-mineral affidavit, was false, fraudulent or in any respect contrary to fact, and denies that this defendant or said Mary N. McIntyre or said Charles M. Krueger or said William E. Moses, took or conveyed the title to said land with full or any knowledge or notice of any false or fraudulent statements in said application or said affidavit or any fraud whatsoever in the procurement of said patent. Defendant denies each and every allegation in the said third paragraph of said complaint contained.

Fourth. Defendant denies each and every allegation in the 4th paragraph of said complaint, and says that the facts regarding the same are more fully hereinabove set forth.

For a Second Defense.

Defendant says that she is an innocent purchaser for value of said premises. That on, to-wit, the 2d day of September, one William E. Moses made application to enter the premises

described in said complaint, by the use of soldier's addi-
12 tional homestead [strip]. That on the 15th day of April, A. D. 1910, said William E. Moses, for the sum of seven hundred and eighty dollars ($780.00) did convey said lands to said Charles M. Krueger, by deed recorded on June 21, 1910, in book 277 at page 204 of the records in the office of the clerk and [recorded] of the county of Larimer and state of Colorado, and that on, to-wit, the 22d day of April, A. D. 1910, said Charles M. Krueger did for valuable consideration, by good and sufficient deed, convey to Mary N. McIntyre and this defendant, and to each thereof, an undivided one-half interest therein, of the premises described in said complaint, and that this defendant had no notice, knowledge or information of any kind or character, respecting or pertaining to any statement or representation whatsoever, contained in said application or said non-mineral affidavit; that said deed to Mary N. McIntyre and Emma T. Krueger was duly recorded on June 27, 1910, in book 277 at page 217 of the records in the office of the clerk and recorder of said county of Larimer, state of Colorado, and this defendant denies that said Mary N. McIntyre was then or is now the sister of this defendant, and admits that said Mary N. McIntyre was then the wife of said John A. McIntyre, and this defendant further says that on, to-wit, the 22d day of April, A. D. 1913, this defendant purchased from said Mary N. McIntyre, an undivided one-half interest in said premises, and paid therefor the sum of fifteen hundred dollars ($1500.00), a good and val-
13 uable consideration, and received from said Mary N. McIntyre a good and sufficient deed, which said deed was on, to-wit, the 23d day of April, 1913, duly recorded in book 310, page No. 189 of the records in the office of the clerk and recorder of the county of Larimer, state of Colorado; and this defendant says that, at the time of the payment of said money to said Mary N. McIntyre, and at the time of the execution and recording of said deed, and since hitherto, this defendant had no knowledge, information or advice that any statement made in said application for patent or said non-mineral affidavit, was false, fraudulent, or in any respect contrary to fact, and denies that this defendant or said Mary N. McIntyre or said Charles M. Krueger or said William E. Moses, took or conveyed the title to said land with full or any knowledge or notice of any false or fraudulent statements in said application or said affidavit or any fraud whatsoever in the procurement of said patent.

For a Third Defense.

Defendant says that this suit in equity is brought by the plaintiff for the use and benefit of one Perry C. Benson; that

the premises in question are a part of the odd-numbered sections within the limits of the grant to The Leavenworth, Pawnee and Western Railroad Company, made by Act of Congress the 2nd day of July, A. D. 1862, but that said premises never passed to said The Leavenworth, Pawnee and Western
14 Railroad Company or its grantees; that said premises were covered by a valid and subsisting filing at the date of said grant, and that said land was on the 14th day of July, 1872, vacant, unappropriated public land of the United States, and ever since has been so vacant, unappropriated public land, subject to entry by the first legal applicant up to said second day of September, 1909; that said P. C. Benson claims some title thereto, by virtue of a conveyance from one Lorenz V. Lewis, who was then and there acting as trustee for a corporation known as "The Little Sunshine Gold Mining Company"; that said P. C. Benson was fully advised and informed, in the year 1907, that he had no title to said premises, and said P. C. Benson had full and free opportunity to make application to the plaintiff for patent to said premises to enter the same, under the laws of Congress applicable thereto; that said P. C. Benson and those under whom he claims have, for more than thirty years, failed, refused and neglected to take the necessary lawful steps for the acquisition of title to said premises, and to purchase the same from the plaintiff; that during all of said time it was well known and notorious that said "Railroad" company never had title to said premises, and said Benson and his predecessors in title were guilty of gross and inexcusable negligence and laches and have not now, and never have had, any legal or equitable claim to said premises.

Wherefore, having fully answered in the premises, the
15 defendant asks that she may be hence dismissed with her costs in that behalf sustained.

WM. V. HODGES,
MASON A. LEWIS,
JAMES B. GRANT,
Attorneys for defendant.

State of Colorado,
City and County of Denver—ss.

Emma T. Krueger, being first duly sworn, on her oath deposes and says:

That she is the defendant above-named; that she has read the above and foregoing answer, and knows the contents thereof, and that the matters and things therein stated are true,

except such thereof as are alleged upon information and belief, and as to them, she believes them to be true.

EMMA T. KRUEGER.

Subscribed and sworn to before me this 18th day of May, A. D. 1914.

My commission expires on the 17th day of April, A. D. 1917.

(Notarial Seal) EDNA P. LEIBFREID,
Notary Public.

Endorsed: Filed in the District Court on May 18, 1914.

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16 (Hearing October 9, 1914.)

May Term, 1914.

Before Judge Riner.

This cause comes on now for final hearing on the bill of complaint and answer thereto, E. B. Lacy, Esquire, assistant district attorney, appearing as solicitor for the plaintiff and William V. Hodges, Esquire, appearing as solicitor for the defendant. And thereupon the court hears the testimony produced herein to the hour of adjournment.

(Decree.)

Fifty-Second Day, May Term, Saturday, October 10th, A. D. 1914.

Present: The Honorable John A. Riner, Judge of the district court of the United States for the district of Wyoming, assigned to hold the district court of the United States for the district of Colorado, and other officers as noted on the twenty-fourth day of August, A. D. 1914.

The United States of America,
6272 vs. In Equity.
17 Emma T. Krueger.

Bill to cancel patent and for other relief.

This cause came on to be further heard at this term and was argued by counsel, E. B. Lacy, Esquire, appearing as solicitor for the plaintiff and William V. Hodges, Esquire, appearing as solicitor for the defendant. And thereupon, upon consideration thereof,

It is ordered, adjudged and decreed by the court that the bill of complaint herein be, and the same is hereby, dismissed out of this court.

To which ruling, order, judgment and decree of the court the plaintiff, by its solicitor then and there excepted and an exception is hereby allowed to it.

Petition for Allowance of Appeal.

To the Honorable Robert E. Lewis, Judge of the United States district court for the district of Colorado:

The above named plaintiff, the United States of America, conceiving itself aggrieved by the decree made and entered in this cause on the 10th day of October, A. D. 1914, dismissing the bill of complaint, does hereby appeal from said decree to the United States circuit court of appeals for the eighth circuit, for the reasons specified in the assignment of errors which is filed herewith, and plaintiff prays that its appeal may be allowed, and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the United States circuit court of appeals for the eighth circuit, sitting at St. Louis, Missouri.

Dated the 23rd day of February, A. D. 1915.

HARRY B. TEDROW,
United States attorney for the District of Colorado.

E. B. LACY,
Assistant United States Attorney.

J. I. HOLLINGSWORTH,
Assistant United States Attorney.

Endorsed: Filed in the District Court on Feby. 23, 1915.

Assignment of Errors.

Comes now the plaintiff in the above entitled cause by Harry B. Tedrow, United States Attorney, and E. B. Lacy, and J. I. Hollingsworth, Assistant United States Attorneys, and says that the decree entered in the above entitled cause on the 10th day of October, A. D. 1914, is erroneous, unjust and prejudicial to the plaintiff in the following particulars:

I.

The court erred in making and entering the decree dismissing the said bill of complaint.

II.

The court erred in failing and refusing to enter a decree cancelling the patent for the land in suit issued to William

E. Moses on the 6th day of January, A. D. 1910, and restoring the title thereto to the plaintiff, the United States of America.

III.

The court erred in finding and holding that the defendant purchased the land in suit without any knowledge of the fraud perpetrated upon the plaintiff in obtaining the
20 patent thereto.

IV.

The court erred in finding and holding that the defendant purchased the land in suit in good faith.

V.

It having been shown by the evidence and held by the court that the patent to the land involved was fraudulently procured, the court erred in not finding and holding that the defendant was charged with knowledge of such fraud.

VI.

It having been shown by the evidence and held by the court that the patent to the land involved was fraudulently procured, and that one Perry C. Benson was in adverse possession of such land from 1904 to and including the dates of purchase of the same by defendant, the court erred in not finding and holding that such adverse possession put defendant upon notice of and charged her with constructive knowledge of the fraud perpetrated upon the plaintiff in the procurement of the issue of said patent.

VII.

The court erred in finding and holding, in substance and effect, that the defendant was an innocent purchaser for value without either actual or constructive knowledge or notice of the fraudulent character of the entry of William E. Moses.

Wherefore, the plaintiff prays that the said decree be
21 reversed; that said United States circuit court of appeals for the eighth circuit shall cause the proper decree to be entered, whereby the said patent issued to William E. Moses on the 6th day of January, A. D. 1910, shall be cancelled and the title to the land involved in said suit

shall be restored to the United States of America; and for such other relief as the plaintiff may be entitled to receive.

Dated, February 23rd, A. D. 1915.

HARRY B. TEDROW,
United States Attorney for the district of Colorado.

E. B. LACY,
Assistant United States Attorney.

J. I. HOLLINGSWORTH,
Assistant United States Attorney.

Endorsed: Filed in the District Court on Feby. 23, 1915.

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22 (Notice of Lodgment of Statement of Evidence.)

Notice of lodgment of statement of evidence to be included in the record on appeal, and application to the court for approval of the same.

To the above named defendant and William V. Hodges, her attorney:

You, and each of you, are hereby notified that on the 23rd day of February, A. D. 1915, the above named plaintiff lodged with the clerk of the United States district court for the district of Colorado a statement of the evidence to be included in the record on appeal in said cause, and that on the 6th day of March, A. D. 1915, or as soon thereafter as counsel may be heard at the City and County of Denver, state of Colorado, the plaintiff will ask the court to approve said statement.

Dated at Denver, Colorado, this 23rd day of February, A. D. 1915.

HARRY B. TEDROW,
United States Attorney for the district of Colorado.

E. B. LACY,
Assistant United States Attorney.

J. I. HOLLINGSWORTH,
Assistant United States Attorney.

Service of a copy of the above and foregoing notice is hereby [acknowledge-] this 23rd day of February, A. D. 1915.

23 WM. V. HODGES,
Attorney for defendant, Emma T. Krueger.

Endorsed: Filed in the District Court on Feby. 23, 1915.

(Order, February 23, 1915, allowing Appeal.)

Before Judge Lewis.

On motion of J. I. Hollingsworth, assistant United States attorney, and it appearing to the court that the above named plaintiff has heretofore filed herein its petition for allowance of an appeal, and concurrently therewith its assignment of errors,

It is hereby ordered that an appeal to the United States circuit court of appeals for the eighth circuit from the decree in said cause made and entered on the 10th day of October, A. D. 1914, dismissing the bill of complaint herein, be, and the same hereby is allowed.

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24 Statement of Evidence to be Included in the Record on Appeal.

Be it Remembered, that on the 9th day of October, A. D. 1914, the same being one of the juridical days of the regular May A. D. 1914 Term of the District Court of the United States within and for the District of Colorado, sitting at Denver, Colorado, the above entitled cause came on for hearing before the Honorable John A. Riner, presiding judge of said court, the plaintiff appearing by E. B. Lacy, and J. I. Hollingsworth, Esqrs., its attorneys, and the defendant appearing by William V. Hodges and James B. Grant, Esqrs., and thereupon the following proceedings were had, that is to say:

Thereupon the Plaintiff to Maintain the Issues Herein in its Behalf, Offered and Gave in Evidence as Follows, to-wit:

25 Mr. Hodges: At the outset I want to make an objection to the introduction of any testimony in support of the bill because the bill on its face states no equities.

The Court: Call your first witness for the government.

William E. Moses, called on behalf of plaintiff, testified in substance as follows:

Direct Examination.

Resides in Denver, Colorado; engaged in land scrip business; identifies his signature on a certain paper bearing the signature "William E. Moses," included in plaintiff's exhibit A, which exhibit was offered in evidence as being a certified copy of original land office papers upon which the application of Moses was allowed and the patent issued to the

land involved in suit. (Objected to as being incompetent, irrelevant and immaterial "because there is no statement in that application that has any bearing upon the allegations in this complaint. I find no statement that the land is unimproved or unoccupied or unappropriated by any person claiming said land in the application signed by Moses; so that I say that paper that they read is immaterial to any issue in the case; nor do I know of any lawful rule or regulation which requires such a statement to be made in this application, and therefore if such a statement were made in there it would be incompetent, irrelevant and immaterial. Secondly, as to the affidavit of McIntyre, I object to that as incompetent, irrelevant and immaterial because there is, so far as I know, no law, rule or regulation which requires, as a condition to secure title, a statement in this nonmineral affidavit that the land was not held adversely to the selector. * * *)

The Court: There is no controversy about the scrip. You may offer them subject to Mr. Hodges' objection. When I dispose of the case I want to look at those papers."

So much of plaintiff's exhibit A as is material is as follows:

4-09154

26 Department of the Interior.

Soldier's Additional Homestead Entry
By Assignee.

U. S. Land Office, Denver, Colorado, No. . . . . .

Application.

I, William E. Moses (Male), a resident of
(Give full Christian name.) (Male or female.)
Denver, Colorado, the legal assignee of Mary Jane Rossman,
(Give full post-office address.)
the widow of William H. Rossman, deceased, beneficiary (or
(Give full Christian name of beneficiary or beneficiaries.)
beneficiaries) under Section 2306, & 2307 Revised Statutes of the United States, granting additional lands to soldiers and sailors who served in the Army or Navy of the United States during the War of the Rebellion, do hereby apply to enter W½ of NE¼, Section 17, Township 5 N., Range 69 W., 6th P. Meridian, containing 80 acres, within the Denver, Colo., land district, as additional to the original homestead on the S½ of SW¼, Section 6, Township 109 N., Range 33 W., 5th P. Meridian, containing 79.64 acres, entered at the United States Land Office at St. Peter, Minn., per Homestead Entry (or Entries) No. 2393 dated September 1st. 1865; and I do

solemnly swear that I am a native born citizen of the United
(State whether native born or naturalized;
if naturalized, certified copy of naturalization must be filed with this application.)

States, over twenty-one years of age; that I am the identical person named in the accompanying assignment of Mary Jane Rossman, the widow of William W. Rossman, deceased, the original beneficiary (or beneficiaries) entitled to make soldier's additional homestead entry (or entries) of 80 acres of public land under the provisions of Section 2306, & 2307, Revised Statutes, as additional to the original homestead entry (or entries) above described; that I purchased same in good faith and am now the holder and owner thereof; that I have not made an entry of public lands as such assignee, and that I have not sold or disposed of said right of entry but that the same is vested in me unimpaired; that as such assignee I present herewith the said assignments, together with proof of right of entry granted to the said beneficiary (or beneficiaries) under the provisions of said Section 2306, & 2307 09154.

*I am not well acquainted with the character of the land herein applied for and with each and every legal subdivision thereof, not having personally examined the same; that there is not to my knowledge within the limits thereof any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, or copper, nor any deposit of coal, placer, cement, gravel, salt spring, or deposit of salt, nor other valuable mineral deposit; that no portion of said land is claimed for mining purposes under the local customs or rules of miners, or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially nonmineral land; that my application Posted in V 2/147 May 16, 1910
Noted at Hd. 2393 St. Peter Minn, see Vol. [Tracy 7 pg.
27 121 EEH10] therefore is not made for the purpose of fraudulently obtaining title to mineral land; that the land is not occupied and improved by any Indian, and is unoccupied, unimproved, and unappropriated by any person claiming the same other than myself (except .....)

WILLIAM E. MOSES,
(Sign here, with full Christian name.)

*Note.—If applicant is not personally acquainted with the character and condition of the land applied for, affidavit as to character and condition may be made by any credible person having the requisite knowledge.

Note.—Every person swearing falsely to the above affidavit will be punished as provided by law for such offense. (See Sec. 5392, R. S., below.)

I Hereby Certify that the foregoing affidavit was read to or by affiant in my presence before affiant affixed signature thereto; that affiant is to me personally known (or has been satisfactorily identified before me by .....);
(Give full name and post-office address.)
that I verily believe affiant to be a credible person and the identical person hereinbefore described, and that said affidavit was duly subscribed and sworn to before me at my office, in ..... this 2" day of Sept., 1909.

(Town.) (County and State.)

C. D. FORD,
Reg.
(Official designation of Officer.)

United States Land Office at .....
....., 19..

It Is Hereby Certified that the above application was this day received with the attached assignment of soldier's additional homestead entry that same might be noted on the tract books and further action thereon suspended until advice from the Commissioner of the General Land Office; that the fees and commissions were tendered in full, and that there is no prior or adverse right to the lands applied for.

..... Register.
..... Receiver.

Revised Statutes of the United States. Title LXX.—Crimes. —Chap. 4.

Sec. 5392. Every person who, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by fine of not more than two thousand dollars, and by imprisonment, at hard labor, not more than five years; and shall, moreover, thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed. (See Sec. 1750.)

Note.—In addition to the above penalty, every person who knowingly or willfully in anywise procures the making or

presentation of any false or fraudulent affidavit pertaining to any matter within the jurisdiction of the Secretary of the Interior may be punished by fine or imprisonment.

4-008a.

Soldier's Additional Homestead Entry by Assignee.

. . . . . .

U. S. Land Office,
No. .....
Application.

Name .....
Date .....
Section .....
Township .....
Range .....

Notation of Action.
(Space below for use in General Land Office only.)

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28 Printed by and for the exclusive use of The W. E. Moses Land Scrip and Realty Company, Denver, Colorado.

Non-Mineral Affidavit.

This Affidavit can be sworn to only on personal knowledge, and can not be made on information and belief.

N. B. Non-Mineral Affidavit need not be made by the entryman. See Mendenhall vs. Howell, et al., 14 L. D. 461: "The non-mineral affidavit may be made by the attorney of the applicant."

Forest Lieu Selections: See Instructions, 29 L. D. 580: "The non-mineral affidavit" may be made by any credible person possessed of the requisite personal knowledge in the premises."

United States Land Office.
Denver, Colorado.

September 2nd. .. 1909.

John A. McIntyre, being duly sworn according to law, deposes and says, that he makes this affidavit to enable William E. Moses to acquire Government title to the West Half of the North-east quarter (W½ of NE¼) of Section 17, Township 5 North, Range 69 West, 6th Principal Meridian; that he is

well acquainted with the character of said described land, and with each and every legal subdivision thereof, having frequently passed over the same; that his personal knowledge of said land is such as to enable him to testify understandingly with regard thereto; that there is not to his knowledge, within the limits thereof, any vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin or copper, or any deposit of coal; that there is not within the limits of said land, to his knowledge, any placer, cement, gravel, or other valuable mineral deposit; that no portion of said land is claimed for mining purposes under the local customs or rules of miners or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially non-mineral, and is not in any manner occupied adversely to the selector; also that there is not to his knowledge, within the limits thereof, any salt spring or deposits of salt in any form, such as make it chiefly valuable on account thereof; that no portion of said land is claimed for saline purposes, and that said land is essentially non-saline land, and that said application therefor is not made for the purpose of fraudulently obtaining title to mineral land, but with the object of securing title to said land under provisions of Sections 2306 and 2307 of the Revised Statutes of the United States. That the above described land is not occupied and improved by any Indian.

(Seal) JOHN A. McINTYRE.
My P. O. Address is 308 Cooper Build.
Denver, Colo.

I hereby certify that the foregoing affidavit was read to affiant in my presence before he signed his name thereto; that said affiant is to me personally known (or has been satisfactorily identified before me by .....), and that I verily believe him to be a credible person and the person he represents himself to be, and that this affidavit was subscribed and sworn to before me at my office in Denver, Colorado, within the Denver Land District on this 2nd day of September, 1909.

29 ELSIE M. SUTHERLAND.
Notary Public.
(Official Seal.) Title of Officer.
My commission expires August 13, 1911.

Note—The officer before whom this affidavit is taken, should call the attention of the witness to the following section of the Revised Statutes, and state to him that it is the purpose of the Government, if it be ascertained that he testifies falsely, to prosecute him to the full extent of the law.

Revised Statutes of the United States.
—Title LXX. Crimes. Chap. 4.

Sec. 5392. Every person, who, having taken an oath before a competent tribunal, officer or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose or certify truly, or that any written testimony, declaration or certificate by him subscribed is true, wilfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by a fine of not more than two thousand dollars, and by imprisonment at hard labor at not more than five years, and shall moreover thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed.

09154

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30 Made this application at the request of Mr. Krueger to whom the scrip was sold; never saw the land; was not familiar with it and so stated in the application; had nothing to do with the preparation of the papers in connection with this filing; merely filed them at the land office; patent for the land was transmitted direct to Krueger; had letter to that effect, and Krueger afterward stated that he had received it; after patent issued witness conveyed land to Krueger on presentation by Krueger of patent Krueger furnished the non-mineral affidavit, and his recollection is that the deed by which he conveyed this land ran to Charles M. Krueger; no one but Krueger in this transaction; the entire transaction was for Krueger who had bought the scrip; believes Krueger paid $780 for the scrip; the money Krueger paid witness was for the scrip, not for the land; scrip was paid for February 17, 1908, and was located February 19, 1908, two days after it was sold by witness; knew Krueger well; he was a clerk in the United States Land Office at Denver, Colorado, when witness first knew him "and probably twenty-five years thereafter."

Cross-Examination.

Recollection is that Krueger was clerk in said land office at the time of this transaction; the date of application as given refers to the original application based upon other scrip, which proved invalid, after which the scrip upon which the application was allowed was substituted; has no data showing the date of filing this second scrip; Krueger paid the $780 for the original scrip and the second scrip was

substituted therefor after the first scrip was held in-
31 valid by the Land Department; Krueger did not act as witness' attorney in this application; witness looked after the transaction himself; nothing unusual in making an application in this way after sale of scrip; has done it many times; Krueger did not represent witness in securing any of the papers in connection with this application; the non-mineral affidavit was necessary as witness hadn't the means of knowledge upon which he could make the required affidavit and he so advised Krueger, and so far as he knows Krueger secured such affidavit; non-mineral affidavit appears from the acknowledgment to have been made in the office of witness; does not remember as to whether or not Krueger brought this non-mineral affiant, McIntyre, there; does not remember the circumstances; witness may not have seen this non-mineral affiant at all as the office of the notary who took the acknowledgement is separate from that of witness; it is even more than possible that witness did not see this non-mineral affiant, McIntyre; witness filed this non-mineral affidavit; was no doubt familiar with the general contents of the affidavit, but knew nothing about the facts; witness inserted the word "not" in the application so as to make it read that witness was not acquainted with the facts in the case; for that reason it became necessary to secure the non-mineral affidavit; at the time witness made the deed to the land to Krueger no consideration was paid for this deed; the oral understanding between him and Krueger at the time he sold Krueger the scrip was that such deed would issue when patent issued; presumes there was a guarantee to the effect that the scrip purchased by Krueger would secure for him land; "if it wasn't in writing it was implied." That was the effect of witness' arrangements with Krueger in the sale of this scrip; never saw the land patented upon this application, and knows nothing about it since he conveyed it to Krueger; never claimed any interest in the land.

Receiver's receipt marked for identification, defendant's exhibit 1; witness probably saw this receiver's receipt in the regular course of business though has no recollection of it.

32 Redirect Examination.

Was aware of the fact that the application for this land stated that the land was unoccupied, unimproved and unappropriated "by any person claiming the same other than myself." It was undesirable to erase this language. "It was not expected by the department to have papers erased or ruled out and the word 'not' was put in there for the pur-

pose of protecting me in that statement, not having personal knowledge thereof, and the non-mineral affidavit was called for and executed by a party who was familiar with it." The insertion of the word 'not' justified him in signing the application.

"Q. Did anybody suggest to you your leaving that in or out? A. I suggested changing it, and then it was decided to cure it. Q. Who decided that? A. I decided that. I will not undertake to say what Mr. Krueger said about it, except that I discussed that matter," with him.

Witness "retrenched" by using the word "not" "believing that I then was justified in signing the application, accompanied by the non-mineral affidavit of a party who was familiar with it."

"The Court: I want to ask this witness one question. What would have been the effect on the action of the department if you had erased those words? What would have been the effect upon the application in the department? The Witness: The rpobalities are that I would have been required to amend or else furnish an affidavit explaining. The Court: But if you had struck out the words that the land was unoccupied —all of that part—suppose you struck that out, what effect would it have on the application? The Witness: It would have caused its rejection. Mr. Hodges: I cannot very well object, but I would like to suggest that that is a question of law, and I think I have the land office cases here showing that it would not lawfully cause its rejection. The Court: He has had considerable experience with the land office. Mr. Hodges: May I ask him about that? The Court: Yes. By Mr. Hodges: Q. Mr. Moses, have you ever sent in an
33 application such as this with the words referred to erased? A. Personally, no, sir. Q. Have you ever known of an application to be rejected because they were erased? A. I have known of cases, where the language was not sufficiently clear upon that point, to call for explanation and for a compliance with the rule then in force, and I have known of at least one case—by the way, it is my own case—where the application was rejected for the reason that I declined to furnish the evidence. Q. What evidence was that? A. It was in a different class of entry, what is known as forest reserve scrip, located by an attorney in fact in Nevada, and made a statement as is expressed in there, that the land was not adversely occupied, when as a matter of fact it was. I had no knowledge of the facts at all. I was called upon several years later to make an affidavit of that kind or furnish it, and I declined to do so, and my attorney in fact declined to do so, and the scrip location was cancelled."

His understanding was that the department did not like to have the words in this form stricken out, and if stricken an explanation was required. If the word "not" had not been put in the application in the present case the non-mineral affidavit would not have been required; the insertion of the word "not" was what rendered the non-mineral affidavit necessary.

"Q. Now, have you ever known of an instance where a soldier's additional scrip application was rejected because someone else was in occupation of the land, or had put improvements on the land after they were there without right? A. Yes. Q. In what instance—in what case? A. Well, I don't know that I can. It was in my own cases. Q. In what case? A. Well, I would not be able to identify it accurately. I located soldier's scrip in Tippecanoe, Indiana,—land similar to the case under discussion; and other parties were in possession of the land at the time. At that time there was no rule requiring an affidavit to the effect that the land was even non-mineral or that it was occupied. I complied literally with the rule, but, as a matter of fact, another man occupied—
34 claimed the land, and my application was rejected because of his possession. Q. Did you have a ruling of the secretary on it? A. Oh, yes. Q. You must be able to find a reference to it? A. I can find it in my office."

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35 PERRY C. BENSON, called on behalf of plaintiff testified in substance as follows:

Direct Examination.

Has resided near Loveland, Colorado, since 1891; was born in the State of Iowa; claims the land in controversy; purchased it in 1904.

"Mr. Hodges: Of course, it is alleged here that in 1909 this land was unreserved, unsegregated and subject to entry and acquirement under plaintiff's land laws, and not otherwise. I object to the introduction of any evidence for the purpose of showing any different status on that date. The Court: You may have your exception, Mr. Hodges. I will rule on it when I rule on the case."

Land was in rough and unimproved condition when he bought it; there were four different small strips which had been slightly cultivated, about five acres in all; the land was occupied at that time with a fence around all but a small portion on the mountain side that the highway cut off; only about four acres thus cut off; paid $1375 cash for the land; had abstract of title examined by lawyer who reported the

title was "all right;" began improving place as soon as he purchased it.

Identified plaintiff's exhibit B as a deed under which he acquired this land. Plaintiff's exhibit B offered in evidence. (Objected to as immaterial.) "The Court: Admitted subject to the objection. I will rule on it when I rule on the case." (Exception.)

Wanted to till the soil and began getting timber off and the ridges graded down, and the rocks out of the way so that he could obtain water; had to go a mile and a half and fight for water rights on the south side; has constructed ditches and headgates for the irrigation of the land at large expense spending from $35 to $50 an acre; a small portion was over $50, three or four acres $35 an acre, then there was quite a large tract that would not be over $4 or $5 an acre, in preparing for cultivation and getting water for the land—something like 55 or 56 acres; and still intend to further improve the land; moved house and barn on the land from a portion of the land to a more desirable portion at quite an ex-
36 pense, and built an implement shed, and a barn and built a cistern, hen house and cave; the last of these improvements were completed at least prior to September 2, 1909; probably in the spring of 1909; lived about 2½ miles from the land; all the improved land has been cultivated since he has had it, sometimes by himself and other times by renters; the land was cultivated from 1907 up to the present.

"The Court: Was this land under irrigation prior to September, 1909? The Witness: Yes. The Court: How many acres prior to 1909? The Witness: Why, all of it. * * * The Court: About how many inches of water? The Witness: I know that there is some high places—points—that I have not graded down. It is all under irrigation,—that is, the ditches that I have will cover all of it aside from a few high places that I have not graded down yet. I have not got it all completed. The Court: That was true in 1909 prior to September? The Witness: Yes, sir."

Received a letter from Charles M. Krueger; does not know where it is.

Thereupon a copy of such letter was produced by attorney for defendant and was exhibited to witness, who after reading the same stated that the contents was "the sum and substance any way of what I recollect of it" as being in the letter he received from Krueger. Thereupon said letter was offered in evidence as plaintiff's exhibit C and is as follows:

Plaintiff's Exhibit C.

Chas. M. Krueger.
Land and Mining Attorney,
Phone Main 6204 Denver

August 3, 1907.

Mr. P. C. Benson,
Loveland, Colorado.

Dear Sir:

Upon a search of the records, I find that you are the present owner of the W½ NE¼, Sec. 17, Tp. 5 N., R. 69 West of the 6th P. M., and that the title thereto is imperfect.

37 If you are sufficiently interested, I would be pleased to correspond with you relative to the matter and assist you in curing the defect.

My charges will be reasonable.

As to who I am, I would refer you to Messrs. Foote, Riner Bartholf, James and others of your city.

Respectfully,

CHAS. M. KRUEGER.

Didn't then know Krueger; never heard of him before.

Thereupon a paper was handed to witness, marked for identification as plaintiff's exhibit D, who after reading the same stated that he tore this paper off the dwelling house on the land in controversy.

Plaintiff's exhibit D offered in evidence and is as follows:

Plaintiff's Exhibit D.

Denver, Colorado, July 5, 1910.

To Whom It May Concern:

You are hereby notified that the undersigned, owners of the following described tract of land, to-wit, the W½ of the NE¼ of Section 17, Township 5 North of Range 69 West of the 6th P. M., hereby forbid any trespassing upon said described land or any portion thereof, under penalty of prosecution, under the law.

EMMA T. KRUEGER and
MARY N. McINTYRE, owners,
By John A. McIntyre, their agent.

38 Is still in possession of the land; about the last of March or first of April, 1913, a lady—defendant, Mrs. Krueger —came to the house where he was living and told him that

the land involved in this suit was her property, and that she was going to take possession of it; she then left going in the direction of the land in controversy; about three weeks later Mrs. Krueger came to the land in controversy when witness was there at work and went into the house and stated that she had come to take possession of the land; his son was then living in the house; the first knowledge he had of patent being issued for this land was by seeing it in the Denver papers; this was probably in July, 1909, then came to Denver to get legal advice; has been paying taxes on this land ever since he bought it; when he received letter from Mr. Krueger he didn't do anything.

Cross-Examination.

Occupation is that of farming;

"Q. Did you request the United States Government to begin this suit and set aside this patent?

A. Why, I dont know just how that would come up. I have attorneys that are doing the business for me, and I am not advised in any way; I leave that to them.

Q. But you understand, don't you, that this bill in equity to set aside this patent?

A. Yes, sir.

Q. —is being brought for your benefit?

Mr. Lacy: That is a matter of conclusion with which this witness had nothing to do whatever. We protest, that that is not a fact, as a matter of law.

The Court: You may ask the question. To which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

Q. Mr. Benson—

A. Yes.

Q. —can you answer that question? (Last question read.)

A. Yes, sir, I understand that.

Q. And you claim to be entitled yourself to a patent from the United States Government for this land?

A. Entitled myself?

Q. Yes, sir, entitled to a patent from the government to yourself for the land?

A. I don't know as I paid any attention to that; left that to an attorney of Loveland to undertake to protect me in my purchase. I never examine such things."

39 [—] was a house on the land when he bought it in which a family was then living; this family vacated about the time he took possession of the land, and another

man moved in as his tenant; couldn't say who built the fence that was there when he bought it; this man that first went in as his tenant stayed there until about 1906; has sowed part of the land to beets; witness farmed a part of the land during that time himself; some 50 to 55 acres of this land was cultivated by irrigation during the years 1907 and 1908; had a tenant on the land in 1907, 1908 and 1909; the man who cultivated the place in 1909 lived on an adjoining farm. Doesn't think any one lived in the house on the land in 1909 until the fall. 35 to 40 acres of crop materialized in 1909, not fully though, but it was cut down; the weeds took part of it; which crop was plainly visible to any one going on the land; the land is rough and a person might go across a portion of it and not see the crop; not certain as to whether all of the crop was covered with water in 1909; witness does not think it was; the cement flume which was built to bring water to this land broke and didn't get all of the land cultivated that year; this cement flume was built for the purpose of putting water on a certain portion of this land which could not be reached by means of other ditches; the land on the north side of the river is irrigated from the Louden ditch, which also covers his home place; was on the land a number of times during 1909 and 1910; his son has lived in a house on the land since the spring of 1913; when he saw Exhibit C on the house he tore it off and ordered Mrs. Krueger out of the house when he saw her there; Mrs. Krueger then went off the place and brought a suit to eject witness from the land, which suit is still pending; more than half of 37 acres of the land was irrigated—covered by water—during 1909; is satisfied that the house on the land was occupied during the years 1907 and 1908; a portion of the land was cultivated to crops during 1906, 1907, 1908, and 1909, either by himself or renters, or both; has bought seed and furnished them to renters to sow on this place, sometimes a second and third time during the year, and knows that they attempted to raise crops on the place on an average from 35 to 50 acres each year; the people living in the house on this place had beds, table and stuff, chairs, and what a person not of the wealthy class ordinarily would have; saw such things in the house.

"Q. You saw such things in the house, did you?
A. Yes, sir."

Saw such things in the house and conversed with the people therein during 1904, 1905, 1906, 1907, 1908 and 1910; when he bought the house in 1904 the agent of the company from which it was bought was living there; the man who farmed the place in 1909 lived on an adjoining farm; al these improve-

ments were on the place in 1909 and are still there; the cement ditch spoken of is not on the land, but brings water to the land; at the time Mrs. Krueger came to the house on the land the house was occupied by his son and wife.

Redirect Examination.

The largest cultivated portion of this land consisted of about 23 acres, which could be readily seen by any one passing on the road.

Thereupon the following written stipulation by and between the parties, showing chain of title from the Denver Pacific Railway and Telegraph Company to Harry C. Benson, plaintiff's exhibit E, was read into the record and introduced in evidence, and is as follows:

(Mr. Hodges: I object to the materiality of it.)

Plaintiff's Exhibit E.

"It is hereby stipulated by and between the respective parties to the above entitled cause, that, at the trial of said cause, a certain photographic copy, hereto attached, of the abstract of title to the west half of the northeast quarter of section seventeen, township 5 north, range 69 west of the sixth principal meridian, in Colorado, consisting of forty-five pages, the original of which purports to have been prepared by The Larimer County Abstract of Title Company, and which is numbered 4788, or any entry therein contained, may
401/2 be introduced by plaintiff and received in evidence, and that the statements contained in each of said entries are in conformity with the statements contained in the public records in the office of the county clerk and recorder of Larimer County, Colorado, to which they purport to relate; that each entry when so introduced shall have the same force and effect in establishing the facts therein contained as would a duly certified copy of such public records. It is hereby further stipulated and agreed by and between the respective parties to the above-entitled cause that for the purpose of the trial of this cause the following is a correct statement of the facts, namely:

By Act of Congress of July 2, 1862 (12 Stat. 489), Congress granted to the Leavenworth, Pawnee and Western Railroad Company, a right of way over certain public lands, and also certain public lands to aid in the construction of said railroad. That under and by virtue of a certain Act of Congress of March 3, 1869, the Denver Pacific Railway and Telegraph Company became the owner of and entitled to all the rights and benefits so granted and conferred by said Act of Congress

of July 2, 1862, and said company selected and definitely located its said right of way, on August 20, 1869, and so selected and definitely located and fixed its said right of way as to bring the lands involved in this suit within the primary limits of said grant. On April 13, 1866, Robert W. Woodward filed a certain valid pre-emption declaratory statement, numbered 2094, as provided for in the Act of Congress dated September 4, 1841 (5 Stat. 455), for the lands hereinabove described (unoffered lands), upon which final proof and payment was never made, that said declaratory statement was a valid and subsisting claim on August 20, 1869, and all rights under and by virtue of said pre-emption filing of said Woodward expired by operation of law on July 14, 1872, up to which date said filing was a valid and subsisting filing."

So much of said abstract as shows a chain of title from the Denver Pacific Railway Company to Perry C. Benson of the lands in question, and so much thereof as shows the
41 Krueger chain of title to date of certification of abstract, follows:

No.	Recorded Book	Page	Grantors	Grantees	Nature of Instrument
7	D	520	John Evans, trustee, Denver Pacific Railway and Telegraph Company	James Langston	Deed
11	101	400	Estate of Jas. Langston	Mary Langston	Court Decree
13	100	267	Mary Langston Mary E. Brown Anna R. Garrett	Chas. J. Langston	Warranty Deed
15	155	234	H. J. Langston	Chas. J. Langston	Warranty Deed
16	155	347	Chas. J. Langston	Arthur V. Parks	Warranty Deed
19	162	351	Arthur V. Parks	J. B. Mathews trustee for the Little Sunshine Gold Mining Co.	Warranty Deed
			E. D. Clark	Mary Langston Estate	Affidavit
	181		Chas. J. Langston		
22	155 p	That age 23	Mary Langston died leaving as sole and only heirs	a widow at date of delivery and execution of	
23	186	566	J. B. Mathews trustee Lorenzo E. Lewis, trustee for The Little Sunshine Gold Mining Co.	Lorenzo E. Lewis, trustee for The Little Sunshine Gold Mining Co.	Special Warranty Deed
25	186	605		Perry C. Benson	Warranty Deed
34	280	518	United States	William E. Moses, assignee	Receivers Receipt
35	238	132	United States	William E. Moses, assignee	Patent
36	277	204	William E. Moses, assignee	Charles M. Krueger Mary N. McIntyre	Special Warranty Deed
37	277	217	Charles M. Krueger	Emma F. Krueger ($\frac{1}{2}$ undivided interest each)	Warranty Deed

ABSTR OF TITLE W ½ OF NE ¼ SECTION 17, TWP. 5 N., R 69 W. 6th P. M.

	Consideration		Date of Instrum't			Date of Ack'ment						When filed				Description of Land				
	Dollars	Cents	Mo.	Day	year	Mo.	day	year	Acknowledged by	County	State	Mo.	Day	year	hour	Part	Sec.	Town	Rng.	acres
			Apr.	5	1871	Apr.	5	1871	Wm. N. Byers	Arapahoe	Colo.	...	...	...	...	W. ½ of N. E. ¼	17	5	69	80
se			Nov.	12	1894	Nov.	12	1894	W. J. Sickman	Larimer	Colo.	Nov.	30	1894	...	W. ½ of N. E. ¼	17	5	69	80
eed			Nov.	19	1894	Nov.	19	1894	C. V. Benson	Larimer	Colo.	Nov.	20	1894	...	Undivided ½ W. ½ of N. E. ¼	17	5	69	40
ed			Aug.	24	1900	Aug.	24	1900	J. G. Munson	Larimer	Colo.	Nov.	28	1900	...	Undivided ½ W. ½ of N. E. ¼	17	5	69	40
ed			Jan.	21	1901	Jan.	21	1901	E. S. Allen	Larimer	Colo.	Jan.	22	1901	...	W. ½ of N. E. ¼	17	5	69	80
			Jan.	31	1902	Jan.	31	1902	D. T. Pulliam	Larimer	Colo.	Feby	7	1902	...	W. ½ of N. E. ¼	17	5	69	80
			Apr.	13	1904	Apr.	13	1904	C. V. Benson	Larimer	Colo.	Apr.	18	1904	...					
heirs at said dee	law Ch		as. J.	Lang	sion,	Harr	y J. L	angst	on, Mary E. Brow	n and Anna	R. Gar	rett,	all 21	years	of a	ge and that said partie	s in w	arrant	y deed	book
			Feby	9	1904	Feby	9	1904	Elbert Greenman	Boulder	Colo.	Apr.	18	1904	...	W. ½ of N. E. ¼	17	5	69	80
			Apr.	6	1904	Apr.	6	1904	Jesse E. Wagner	Boulder	Colo.	Apr.	29	1904	...	W. ½ of N. E. ¼	17	5	69	80
			Apr.	8	1910							June	21	1910	...	W. ½ of N. E. ¼	17	5	69	80
			June	6	1910							June	21	1910	...	W. ½ of N. E. ¼	17	5	69	80
			Apr.	15	1910	Apr.	15	1910				June	21	1910	...	W. ½ of N. E. ¼	17	5	69	80
			Apr.	22	1910	Apr.	22	1910				June	27	1910	...	W. ½ of N. E. ¼	17	5	69	80

43 "Mr. Lacy: One minute. I don't know that it is quite determined whether or not these original land office papers were really introduced in evidence.

The Court: I understood them to be in evidence you offered them. They were received in evidence subject to Mr. Hodges' objection, that is my understanding; if not, they may be considered as introduced subject to Mr. Hodges' objection."

Thereupon the plaintiff closed.

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44 (Testimony for Defendant.)

And Thereupon the Defendant, to maintain the issues herein in her behalf, offered and gave in evidence as follows, to-wit:

Emma T. Krueger, called on behalf of the defendant, testified in substance as follows:

Is the defendant herein, and resides in Denver; Charles Krueger was her husband, and was chief clerk of the United States Land Office at Denver, leaving such position February 12, 1907, after which time he was land and mining attorney before the Denver land office and the General Land Office; knew nothing about his making application for the land involved, or when the patent was issued, or anything in connection with the application.

Identified defendant's exhibit 2 as a warranty deed from her husband, Charles M. Krueger, to witness and Mary N. McIntyre conveying to each an undivided one-half interest in the land involved, the stated consideration being $800, said deed being dated and acknowledged April 22, 1910, and recorded in the office of the recorder of Larimer County June 27, 1910, in book 277, at page 217; said exhibit introduced in evidence.

"Q. What consideration did you pay?

Mr. Hollingsworth: We object to that on the ground that in the answer there is no particular consideration stated.

Mr. Hodges: The answer says, "for valuable consideration."

The Court: Of course, he would have a right to amend his answer to cover the proof. It is necessary for him to establish that.

Overruled. You may ask the question.

Q. The question is: what consideration did you pay, at the time of the execution of this deed, to Mr. Krueger?
A. $400.
Q. You paid that yourself to him. A. I did."

Had theretofore been engaged in the business of cleaning, repairing and making over old hats and things of that kind and had money of her own; the $400 paid to her husband was her own money; at the time of making this payment had no knowledge of the facts or circumstances connected with the application for this land; first time she saw this land was on March 27, 1913; Krueger died October 27, 1912.

Identified defendant's exhibit 3 as a warranty deed, dated April 22, 1913, conveying an undivided one-half interest in the land involved from Mary N. McIntyre to Emma T. Krueger, which deed was executed, acknowledged and delivered on the date it bears and stated a consideration of $1000 and other valuable consideration," and was recorded in the office of the recorder of Larimer County April 23, 1913, in book 310 at page 189; said exhibit introduced in evidence.

Identified defendant's exhibit 4 as the check for $1500, dated April 22, 1913, which represented the amount paid by her to Mrs. McIntyre for an undivided one-half interest in the land involved, which check was delivered by her to Mrs. McIntyre; said check bears the signature of witness and the Bridge Hat Company, which was the corporate name under which she was doing business.

Defendant's Exhibit 4.

The Home Savings and Trust Co. No. 15.
23-66.

Denver, Colo., April 22d, 1913.

Pay to the order of Mary N. McIntyre $1500... Fifteen Hundred ..... Dollars.

E. T. KRUEGER,
The Bridges Hat Co.

(Endorsed Mary N. McIntyre, and payment April 23, 1913, evidenced by bank stamps.)

Identified endorsement on said check as that of Mrs. McIntyre; said check was in payment for an undivided one-half interest in this land and nothing else.

"Q. After you acquired this half interest from Mrs. McIntyre you went to the property? A. I did.

Q. And you think that was about the 27th of March, 1913?
A. On Easter Sunday was the first time I saw the
46 land. I was up at Longmont and drove with my friends over to Loveland to see the land. I had never seen it."

There was a house on the land at that time which was pretty well battered; the windows were then pretty well broken out, and it looked as though no one could stay in it without its being repaired a good deal; there was no one in it at that time or any furniture in it; didnt go into the house; "just inside of the yard; I didn't have time; wanted to get back to the train."

"Q. After that you returned again to the house?
A. I did.:
Q. How long after that.
A. Well, I think it was near about the 7th. I think Easter Sunday came on the 27th of March,—it was either the 26th or 27th,—I think it was the 27th, and then a week from the following Thursday, which would be about the 7th of April, I went to establish a man on the place."

That was in the year 1913; when she arrived at the house the second time there were people in the house, and she was very much surprised. "I could not understand it. I had only been there just the week before, and I made inquiries. A lady came out and I asked her who was there, and she said that her name was Benson; and I said 'Are you Mrs. P. C. Benson?'" She said, 'No,' that P. C. Benson was her father-in-law; that her husband and she were there to do farming."

Never saw Mr. Benson until she went up a third time about two weeks later, at which time P. C. Benson came to the house while she was there; knew nothing about any statement which may have been made in the application signed by William E. Moses for this land, or the affidavit of J. A. McIntyre in connection with this application, or whether or not such statement was true or false in any particular.

47 Cross-Examination.

Did not know when the patent to this land issued; her husband never talked to her about receiving the patent until after he had received it.

"Q. After it had issued. Did he say anything about it then?
A. Not particularly.
Q. Do you remember reading in the newspaper anything about patent issuing to your husband, Charles M. Krueger, to this land?

A. No, sir, I didn't read it myself.
Q. You didn't read it?
A. No; I heard it through others.
Q. Heard others talk about it.
A. Yes, sir.
Q. Who did you hear talk about it?
A. Oh, different ones.
Q. Well, do you remember any of them?
A. It was just public talk.
Q. Did you hear your husband talking anything about it?
A. No.
Q. Did you hear Mr. McIntyre say anything about it?
A. No, sir.
Q. You don't remember just who it was?
A. No.
Q. It was just public talk? A. Public talk.
Q. You say the first time you saw this land was 1913?
A. Yes, sir.
Q. Easter Sunday? A. Yes, sir."

Does not remember exactly when she paid the $400 to her husband and received the deed for the undivided one-half interest in the land. "I had sickness at the time."

"Q. You hadn't seen the land up to that time, had you?
A. No, sir, I hadn't. I didn't see it until 1913.
Q. Well, did you know the kind of land you were buying when you bought from your husband—anything about it?
A. No, sir,
Q. You didn't know anything about it?
A. No.
Q. Didn't send anybody out there to look at it either, did you?
A. No, sir, I didn't.
Q. Did you know whether or not your husband had ever seen it?
A. No, I didn't at that time.
Q. You didn't know anything about that?
A. No.
Q. He wanted to sell you this land and you bought it?
A. Yes."

Thought she was getting a good deed; didn't think it was necessary to send any one to look at it before she bought it.

[—] "You didn't think about that?

A. No."

This $400 paid her husband was in cash.

Q. Mrs. Krueger, I will ask you if you have ever seen that newspaper clipping?

A. Yes, sir, I have.

Q. You saw that?

48 A. Yes, I saw it, after the others seen it first.

Q. Did you read that?

A. No, sir, I didn't read it through."

Saw this clipping in about the fall of 1910; does not remember whether it was after or before patent issued.

"Q. You knew—didn't you testify a while ago you knew when your husband got this patent?

A. Why, I testified—I guess I did—he got the patent, but I don't remember the date.

Q. But you knew about it when he got it, didn't you?

A. After he got it.

Q. Do you know how long it was after he got it?

A. No, I do not.

Q. This patent bears date June 6, 1910?

A. Yes.

Q. Now do you know whether it was before or after that that you saw this newspaper clipping?

A. I don't know.

Q. You don't associate the two at all, do you?

A. No, I don't. * * * *

Q. When you saw this had it just come out in the paper?

A. I presume so; I don't know; I don't remember, because I had sickness.

Q. Did someone give you the newspaper or did you just happen to be looking through the paper and see this? Was it called to your attention?

A. It was called to my attention. Someone cut it out of the paper down town and sent it up to me.

Q. Who was that?

A. I don't know. I have got so many friends.

Q. So you don't know whether you saw this before or after the issuance of the patent?

A. No, I don't.

Q. But you saw it? A. Yes, I saw it.

Mr. Hollingsworth: I would like to offer this in evidence, if you have no objection.

Mr. Hodges: No objection at all.

Mr. Hollingsworth: I [till] read it.

The Court: No. Tell me what it is.

Mr. Hollingsworth: It is a statement or an article appearing in the Denver Post here to the effect that Charles M. Krueger had received a patent to this land, and that Perry C. Benson, a wealthy banker of Loveland, had been on this land for some time and that he had been notified that his patent was no good, and that he didn't do anything, and that Krueger and one John A. McIntyre had gotten together and applied scrip to this land and got patent.

The Court: What is the purpose of showing that?

Mr. Hollingsworth: The only purpose is to attach some knowledge of this to the witness.

49 The Court: How does it tend to show that?

Mr. Hollingsworth: That she and her husband doubtless talked this matter over, and that it thereby tended to have some effect.

The Court: I will not pay the slightest attention to that in the consideration of this case.

Mr. Hollingsworth: I will withdraw that, then. I would like permission to read it and let the court see what it is: "Eighty acres of land, lying right alongside the townsite of Loveland, Colo.—land worth in the neighborhood of $50,000—has become the property of two widely known citizens of Denver by the simple act of pre-emption, the land having been subject to entry during all the years when it was held by the old Denver Pacific Railroad Company, the Union Pacific company, and later on warranty deed by P. C. Benson, a wealthy banker of Loveland.

With Uncle Sam behind them as guarantor of the perfection of their title, Charles Krueger of the firm of Krueger & Macey, land lawyers, and J. A. McIntyre, the architect, are ready to take possession of the tract under United States patent.

It is scarcely believable that the supposed owners of the land should have failed to learn of the imperfection of their title and allowed the perfection of it 'go by the board,' but such is the case.

When he was clerk of the United States land office at Denver, a position which he held for twenty years, Charles Krueger discovered that the eighty-acre tract—the west half of the northeast quarter of section 17, township 5 north, range 69 west, was government land and subject to entry. He wrote to Mr. Benson, the man who thought he owned the property, told him of his discovery and offered to see to the perfection

of his title, but, for some reason, Benson failed to respond to the letter.

Happening to mention the matter to his close personal friend, J. A. McIntyre, the latter suggested that the two file on the land. This they did and by the placing of 'scrip,' the customary process, gained title by pre-emption and on yesterday, after two years of waiting, received their government patent to the land.

The land was under entry for pre-emption at the time the government gave the original railroad company its grant, and so was exempt from the provisions of the grant. As the original entryman failed to make final proof and payment his entry was vacated and the eighty acres again became subject to entry as public land.

The railroad company and all other subsequent holders of the land ignored this fact and until now have apparently failed to realize that they had no title."

(Counsel continuing) "Inasmuch as it came to the knowledge of Mrs. Krueger, that that article was read by her, it seems to me that it was enough to show her the necessity of investigating the title before she bought this land, and charged her with some fraud connected with it, and that is why we offered it in evidence."

"Q. You said you were in business, Mrs. Krueger.
A. Yes, sir.
Q. Did you get from your business—realize from your business the $1500 that you paid Mrs. McIntyre for this land?
A. Yes.
Q. That is where you got your $1500, was it?
A. Not entirely.
Q. Where did you get the balance of it?
A. Well, that was mine.
Q. Where did you get it?

Mr. Hodges: I don't think that is material, your Honor, where she got the money. She has shown that her husband was dead at this time.

The Witness: My husband was dead at that time. I had money. As to where I got it, I don't have to tell that.

The Court: I don't think it is important. Why is it important? I am perfectly willing to give you the broadest latitude,

Mr. Hollingsworth: We want to bring out whether or not that check was bona fide and represented so much money, and where she got that money.

Mr. Hodges: Whether so much money was paid on the check?

Mr. Hollingsworth: Yes.

Mr. Hodges: We have no objection to that.

Mr. Hollingsworth: Where she got this money.

Mr. Hodges: That is entirely immaterial. I object to the question: 'Where did you get the money.' If, what he wants to know, 'did you get this from McIntyre, or did you not,' that might be perfectly material.

51 The Court: She has a right to borrow money. You may answer the question.

Q. Where did you get this money.
A. My husband carried some life insurance, and I had it in the bank.
Q. Then the $1500 you paid, part of it was realized from your business and the other part was gotten from your husband's life insurance? A. Yes, sir."

Redirect Examination.

"By Mr. Hodges:
Q. When you paid this $1500, is it or is it not true that Mrs. McIntyre offered to you to either buy or sell at a price?
A. Yes, sir.
Q. And in that way you fixed the price for this land that you paid? A. Yes, sir.

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52 JOHN A. McINTYRE, called on behalf of the defendant, testified in substance as follows:

Has lived in Denver 35 years, and is engaged in the engineering and building business; has been city engineer, building inspector, and served a term in the Legislature; is the identical John A. McIntyre who signed the nonmineral affidavit introduced in evidence as part of plaintiff's exhibit A; identifies signature thereon.

"Q. Did you make this affidavit in Mr. Moses' office?
A. Mr. Moses had a representative come to my office, I think. The gentleman on the stand today and I had never met, but it was a representative—a younger man—fleshy man, —who represented the scrip, and that is all I know about it. Most of the business was done in my office, I think, or Mr.

Krueger's. We had adjoining offices." Thinks that he went over to Mr. Moses' office once and that this affidavit was signed there.

Acknowledged this affidavit; has known the land involved in this suit about 33 or 34 years.

"Q. How did you come to know it?
A. I would not say just that piece, but I have been going by that land for thirty-three years, more or less.
Q. What occasion had you to go by that land?
A. When we came to file on it I went to examine the land."

Prior to that time was interested in quarrying a few miles above the land, and used the road to go by the land.

"Q. Do you know that there was a house on the land?
A. There was a little [fram-] house—little shack.
Q. How long, Mr. McIntyre, had you known that house to be there?
A. Oh, I would not want to say. It had been on there, probably, two or three years before we filed on it. I know I remember seeing the shack there. I am under the impression it was put up by the ditch company. I will say that the ditch company had used that building.
Q. And what condition was that in in 1909?
A. Oh, it was just a little board building—batten.
Q. Was it occupied?
53 A. No; never seen a person in the building around there.
Q. Had you ever seen crops on that land?
A. I don't think there was ever a crop raised on it, to my knowledge.
Q. Up to that time. Did you go onto the land at that time?
A. Yes, sir, went all around on the land.
Q. And had you, within your knowledge of that land ever seen any evidence of its being cultivated or occupied?
A. I never seen a crop raised on the land; never seen anybody working on it.
Q. Did you know that it was fenced?
A. There was a little fence that run around. All that land is fenced along the road—an old fence had been there, probably, for thirty years.
Q. Was the fence in good repair?
A. No. There was probably two or three strands, and all broken down, disreputable fence.
Q. And you have heard the testimony this morning of Mr. Benson? A. Yes, sir.

Q. You have had called to your attention the contents of this affidavit? A. Yes.

Q. And with that full knowledge of that, you state the condition of this land to be that the house was unoccupied; it was a little shanty, battened up, and part of the windows out; you had seen no cultivation on the land; and there was a fence around the land with three barbed-wire strands and in a dilapidated condition; is that correct? A. That is correct.

Q. And you now say that? A. Yes, sir."

Up to the time of making this affidavit had not seen any one working on the land; thinks he knows where the ditch referred to is located; has been hunting over that ground; it is the old main line ditch that was built years ago and lies above the land; does not think it has ever been used on this land; thinks it was a ditch intended to carry water on other lands below; never saw any one running water in this ditch; no laterals from that ditch on this land.

54 Cross-Examination.

At the time he examined this land before he made affidavit saw a dugout barn which, witness thinks had been there thirty years; saw no implement shed or hen house; this barn was built in the side of the bank with some logs and timbers and a little dirt throwed on top, and had been standing there for possibly 25 or 30 years, or longer; spent probably a half hour or an hour in making an examination of the land; thinks it was in the summer or early fall; never saw any crops on the land; has been going up there 33 or 34 years; has hunted and fished all over that country; some of the trees have been cut off of this land and he thinks "somebody cut all the wood off of it and cut it up into cordwood. I think that was done while we were trying to get title to the ground or patent."

"Q. You were asked to pay the owner?

A. My attorney said if there was any improvements put on the land I should pay it, and I went to see what improvements there was. I could not find anything on the land but this little shack there and this fence. Well, there was probably two wires, and then a post would fall down, and it was all tumbled down. Nobody tried to keep it up for years."

Knew Mr. Benson at that time; thinks at one time he made inquiries in the neighborhood as to the ownership and possession of the property and they said they didn't know; thinks Benson claimed it.

"Q. You didn't go to Benson yourself, did you?

A. I did not.

Q. But you were informed that Benson owned that land?

A. We were informed.

Q. You were informed by this individual living up in that section, were you?

A. A gentleman that lives next door. * * * * *

Q. Did you know him?

A. No, sir. He said he judged Mr. Benson claimed the land. * * * * *

Q. But so far as you were concerned you stopped there in your investigation? A. Yes, sir. * * * * *

Q. What did you mean by 'we' when 'we spoke about making this entry'?

A. Krueger and I were interested in it.

55 Q. Interested in it together?

A. Yes, sir.

Q. This copy of the letter written by Charles M. Krueger to P. C. Benson, do you know anything about that letter?

A. I never saw it. Mr. Krueger told me that he notified Mr. Benson. * * * * *

Q. I will ask you to look at exhibit C, Mr. McIntyre, and ask you when Mr. Krueger told you that he had notified Mr. Benson (handing paper to witness)?

A. I couldn't tell you; it has been so many years.

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56 FRED WARNER, called on behalf of the defendant, testified in substance as follows:

Has resided in Denver 35 years; knows the land in controversy; has been going up there and passing the land last 25 years.

"Q. Do you know of a building being built on the land?

A. Well, it seems to me like there has been in that time three or four little houses on there, at different times. The last one that is on there has been renewed, it seems like to me."

There was an older house there about 15 years ago; he went up and down there some 3 years about that time.

"Q. And the house that was there at that time was in what condition?

A. Sometimes it was in good condition; sometimes in bad condition; sometimes the windows was out and sometimes they were all right.

Q. Do you remember this house that was there about 1909?

A. That is the same house that is there now? A. Yes.

Q. What condition was that house in in 1909?

A. I have seen the window lights out and have seen it in good condition.

Q. What was the condition in 1909?

A. I think two window-lights out and unoccupied in 1909. There was no one in it at that time." * * * * *

Q. Do you know whether there was anyone in it in 1908?

A. No; I wasn't there at that time.

Q. Were you there in 1907?

A. I don't recall. It sets off the road a little ways."

Thinks it was occupied in 1906; there has been a number of tenants in it during the summer season; has never seen any one there during the winter season; no one there during 1909 to his knowledge; very old fence around the land for a good many years.

"Q. Did you ever see any one cultivate that land?

A. No, sir, I never say anyone cultivate that land, but I was down there one time when there was, I think, some beets and a little corn down in the bottom—quite a little patch down on the Thompson.

Q. And how long ago was that?

A. That has only been about four years ago, I think
57 it was. It was a time that notice was put up on the house."

He himself put up the notice (exhibit D); the house was unoccupied at that time; never noticed any growing crops there; the land is visible from the road; never knew of the land being irrigated; walked all over the land when he was up there, and there were no laterals on it.

"Q. Would you say that the land was or was not occupied in 1909?

A. It was not at the time I was there. I was there during the summer season. There was somebody there during the summer time before that.

Cross-Examination.

The day he walked all over the land was the day he put the notice on the door, July 5, 1910; had hunted over the land nearly every fall and winter for years;

"Q. That particular land?

A. No; all over that country."

He crossed this particular land in different places from time to time; the public road cuts through the extreme north end of the land, and is the road that is used in going above there—in going to Estes Park, during the summer of 1909 passed along this road three different times on business, and saw the buildings on this land which were a house, a little stable, and a chicken house combined, and a dugout; that was

the first time he ever went over all of this land; investigated then with a view of possible purchase of the land.

"Q. Are you prepared to say, Mr. Warner, that at the time of this application that this place was not occupied?

A. Yes, sir.

Q. That it was not cultivated?

A. I won't say that. I think that there has been a little plowing, more or less, on that land all the time, but not to amount to anything. The south side of that land there is, I think, more what you would term grazing land. In a dry season you will not raise anything. In a wet season you will raise a fair—half crop or maybe two-thirds of a crop. I went over the land a good many times; of late years
58 it has been cultivated."

By late years he means last 5 or 6 years; Mr. McIntyre requested him to post this notice on the land.

"Mr. Hodges: I offer exhibit 5, which is a deed from William E. Moses, Assignee, to Charles M. Krueger, and exhibit 6, which is the original patent, in evidence."

Said exhibit 5 is a special warranty deed from William E. Moses, Assignee, to Charles M. Krueger, dated and acknowledged April 15, 1910, conveying the land involved in this case, the stated consideration being $780, said deed being recorded in the office of the recorder of Larimer County on June 21, 1910, in book 277, at page 204. Said exhibit 6 is the United States patent conveying to William E. Moses, Assignee, etc., the land involved, which patent is dated June 6, 1910.

"The Court: The only question now to solve is whether Mrs. Krueger is an innocent purchaser. Mr. McIntyre testified that Mr. Krueger was his attorney and acted for him in this business. Here is positive notice. There is no question but what they knew that Benson was claiming adversely to them at the time they made this filing. Their papers sent to the land department did not disclose that fact. They were bound to disclose it. Mr. Krueger says in his letter, "Upon a search of the records I find that you are the present owner of the west half of the northeast quarter,' and that your title thereto is imperfect. Mr. Moses states that there is no one in possession adversely. He could have ascertained, without ever seeing the land or knowing anything about the land, by examining the record that there was a chain of title.

On the question of laches, Mr. Benson is not in default. On the question of fraudulently obtaining this patent, I think it was fraudulently obtained by the original parties; but Mrs.

Krueger comes upon the stand—she was a fair witness;
59 I saw nothing in her testimony where she tried to evade answering fully, and fairly stated that she paid actually in cash both to her husband and the other party, and swore positively she had no knowledge of this transaction prior to that. I do not think she is chargeable with notice. If you are able to show and bring home to her any knowledge of these transactions prior to her purchase, then I can see at once that the patent should be set aside and she will be charged with notice. I think to set aside a patent that is in the hands of an innocent purchaser, as she seems to be, under her testimony, the government must bring knowledge home direct to her. You are trying to set aside a patent on the ground of fraud. She must be a party to or have notice of that fraud. She had no knowledge whatever of it, and she said she did not. She did not even know anything about the land at the time it was purchased. I do not think it is her duty to examine the land. She found out after she bought the land that there was something there. She must have some knowledge before the conveyance. The testimony is that she did not.

Mr. Lacy: She should have made inquiry.

The Court: At the time she purchased she did not know anyone was claiming adversely to her. That knowledge came to her subsequently. There is no question in my mind but what the patent was wrongfully issued. There is not a shadow of a doubt about it; but her testimony stands here undisputed alone. It is positive; no evasion, or anything to discredit her testimony. Mr. Benson had equity, but he had to exercise it by making his application; he had from 1904 until 1908 to secure his right under the statute by making application for the land, but he did not do it. There is this difference, of course; he holds here under warranty deed. The grantor is bound to protect him.

Thereupon a recess was taken to Saturday, October 10, 1914, at ten o'clock a. m.

60 Saturday, October 10, 1914. Morning Session 10.00 o'clock a. m.

(Thereupon argument was had to the court by counsel for the respective parties.)

The Court: Now, Mr. Lacy, conceding that possession charged her with notice,—and she is bound by all due inquiry would disclose,—suppose she had made the investigation, can it go beyond this proposition, that had she investigated—

had she conducted an investigation and found that Benson had title from the railway company, claiming under grant of the United States, she would have found that he took possession here in 1904; she would have found that he continued in that possession for six years after he took possession; she would have found that under a law of the United States he had a right to make his application and pay $2.25 an acre, but he had not exercised that right; she would have found that in the meantime he took possession from the time the government had issued patent. I think it is a close question. It is worth while presenting to the Appellate Court. I am inclined here to dismiss your bill.

Mr. Lacy: On a former occasion your Honor thought it expedient to let the decree show an exception.

The Court: Oh, yes; under the new rule an exception must be noted. If after consulting and an examination of authorities you still think the rule goes to the extent for which you contend, I would be glad to have the views presented to the Appellate Court. I think it does not go beyond the lines I have just suggested. I do not think she was charged beyond that. That being true, there being no evidence here that she had any knowledge whatever of the fraud in obtaining the patent, she stands in the relation of a bona fide purchaser.

Mr. Lacy: I do not want the court to lose sight of my contention, namely, that by reason of this possession the defendant is on notice of the land office records.

The Court: I am not prepared to go to that extent. I concede the rule that possession charged her with notice of the examination of this title; it charged her with notice of the fact that Benson was in possession in 1904; it charged her with notice that he was still in possession when she took her deed; it charged her with notice that under a law of the United States he could, by payment of $2.25 an acre,—having taken from the railroad company under this special act, have purchased the land and obtained patent; that it charged her with notice that he had not exercised that right and allowed it to lie dormant six years, in the meantime the government, on application of another party, had issued patent.

61

Approval of the Statement of the Evidence to be included in the Record on Appeal.

The foregoing statement of the evidence to be included in the record on appeal being now presented in due time and found to be a complete and properly prepared, I do hereby

approve the same and direct that it be filed in the office of the Clerk of the United States District Court for the District of Colorado, and that it shall become a part of the record for the purpose of an appeal herein.

Dated this 8th day of March A. D. 1915.

JOHN A. RINER,
United States District Judge.

Narrative statement—39 pages—lodged in clerk's office February 23, 1915.

CHARLES W. BISHOP, Clerk,
By Albert Trego, Deputy Clerk.

Endorsed: Filed in the District Court on March 9, 1915.

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62 (Praecipe for Transcript on Appeal.)

Praecipe indicating portions of record to be incorporated into the transcript on appeal.

To the Clerk of said court:

You will please prepare and duly authenticate a transcript of the record in the above entitled cause, for appeal to the United States circuit court of appeals for the eighth circuit, in accordance with Equity Rule No. 76, to-wit:

1. Citation on appeal.

2. Bill of complaint.

3. Subpoena addressed to defendant Emma T. Krueger, and return of service.

4. Answer of defendant Emma T. Krueger.

5. Record showing submission of cause to court on final hearing.

6. Decree.

7. Statement of evidence to be included in the record
63 on appeal.

8. Notice of lodgment of statement of evidence to be included in the record on appeal, and application to the court for approval of the same.

9. Petition for allowance of appeal.

10. Assignment of errors.

11. Order allowing appeal.

12. This praecipe.

13. Clerk's certificate to transcript.

Dated February 23rd, A. D. 1915.

HARRY B. TEDROW,
United States attorney for the district of Colorado.

E. B. LACY,
Assistant United States Attorney.

J. I. HOLLINGSWORTH,
Assistant United States Attorney.

Service of a copy of the above and foregoing praecipe is hereby [acknowledge-] this 23rd day of February, A. D. 1915.

WM. V. HODGES,
Attorney for defendant, Emma T. Krueger.

Endorsed: Filed in the District Court on February 23, 1915.

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65 Citation.

The United States of America to Emma T. Krueger,—Greetings:

You are hereby notified that in a certain cause in equity in the United States District Court in and for the District of Colorado, wherein the United States of America is plaintiff and Emma T. Krueger is defendant, an appeal has been allowed said plaintiff to the United States Circuit Court of Appeals for the Eighth Circuit.

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit at the city of St. Louis, in the State of Missouri, sixty days from and after this citation bears date, pursuant to an appeal allowed by the District Court of the United States for the District of Colorado, wherein the United States of America is Appellant, and said Emma T. Krueger is Appellee, to show cause, if any there be, why the decree entered by said District Court of the United States on the 10th day of October, A. D. 1914, dismissing the bill of complaint in the said cause, should not be reversed and set aside, and why speedily justice should not be done the parties in that behalf.

Witness the Honorable Robert E. Lewis, Judge of the District Court of the United States for the District of Colo-

rado, at the City and County of Denver, in said District, this 23d day of February, A. D. 1915.

ROBT. E. LEWIS,
District Judge.

66 Service of the above and foregoing citation is hereby acknowledged by and on behalf of the defendant Emma T. Krueger, this 23rd day of February, A. D. 1915.

WILLIAM V. HODGES,
Attorney for Defendant.

Endorsed: Filed in the District Court on Feby. 23, 1915.

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67 (Clerk's Certificate to Transcript.)

United States of America,
District of Colorado—ss.

I, Charles W. Bishop, clerk of the district court of the United States for the district of Colorado, do hereby certify the above and foregoing pages numbered from one (1) to sixty-four (64), both inclusive, to be a true, perfect, and complete transcript and copy of the pleadings, and other matters set forth in the praecipe filed herein, together with a true copy of such praecipe, heretofore filed or entered of record in said court and in a certain cause lately in said court pending, wherein The United States of America was plaintiff and Emma T. Krueger was defendant, as fully and completely as the same still remain on file and of record in my office at Denver.

In Testimony to the above, I do hereunto sign my name and affix the seal of said court, at the City and County of Denver, in said district this sixteenth day of March, A. D. 1915.

Seal
U. S. Dist. Court
Dist. of Colorado.

CHARLES W. BISHOP,
Clerk.

Filed Mar. 20, 1915. John D. Jordan, Clerk.

And thereafter the following proceedings were had in said cause, in the Circuit Court of Appeals, viz:

(*Appearance of Counsel for Appellant.*)

United States Circuit Court of Appeals, Eighth Circuit.

No. 4439.

THE UNITED STATES OF AMERICA, Appellant,

vs.

EMMA T. KRUEGER.

The Clerk will enter our appearance as Counsel for the Appellant.

HARRY B. TEDROW,
E. B. LACY,
J. I. HOLLINGSWORTH,
808 *Central Savings Bank Building, Denver, Colorado.*

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Mar. 20, 1915.

(*Appearance of Counsel for Appellee.*)

The Clerk will enter my appearance as Counsel for the Appellee.

WILLIAM V. HODGES.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, May 19, 1915.

(*Order of Submission.*)

September Term, 1915, Tuesday, October 5, 1915.

This cause having been called for hearing in its regular order, argument was commenced by Mr. John I. Hollingsworth for appellant, continued by Mr. William V. Hodges for appellee and concluded by Mr. E. B. Lacy for appellant.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein.

(*Opinion.*)

United States Circuit Court of Appeals, Eighth Circuit, September Term, A. D. 1915.

No. 4439.

UNITED STATES OF AMERICA, Appellant,

vs.

EMMA T. KRUEGER, Appellee.

In Error to the District Court of the United States for the District of Colorado.

Mr. J. I. Hollingsworth, Assistant U. S. Attorney (Mr. Harry B. Tedrow, U. S. Attorney, and Mr. E. B. Lacy, Assistant U. S. Attorney, were with him on the brief), for appellant.

Mr. William V. Hodges (Mr. L. J. Williams was with him on the brief), for appellee.

Before Carland, Circuit Judge, and Amidon and Van Valkenburgh, District Judges.

CARLAND, *Circuit Judge*, delivered the opinion of the Court:

This is an action by the United States to cancel for fraud a patent for the West half of the Northeast Quarter, Section 17, Township 5 North, Range 69 West, Larimer County, Colorado, issued June 6, 1910, to William E. Moses. Appellee had judgment below and appellant appeals. The following facts appear from the record.

On September 2, 1909, one William E. Moses filed in the local Land Office at Denver, Colorado, an application to enter the land above described by the use of soldiers' additional homestead scrip. In said application the applicant stated that he was not acquainted with the character of the land, but that the same was unoccupied and unimproved by any person claiming the same other than himself. The application was accompanied by the non-mineral affidavit of one John A. McIntyre, who in said affidavit made oath that he was well acquainted with the character of the land, and that it was not in any manner occupied adversely to the selector. Moses made the application to enter the land at the request of one Charles M. Krueger to whom Moses had sold the soldiers' additional scrip on which the land was entered for $780.00. Moses never had any interest in the land and conveyed the same to Krueger April 15, 1910.

On April 22, 1910, Charles M. Krueger conveyed an undivided one-half interest in the laid to Emma T. Krueger, his wife, the defendant herein, and the other undivided one-half interest to Mary N. McIntyre, the sister of Emma T. Krueger and wife of

John A. McIntyre who made the non-mineral affidavit at the time the land was entered. On April 22, 1913, Mary N. McIntyre conveyed her undivided one-half interest in the land to said Emma T. Krueger. Other conveyances affecting this land are as follows: April 5, 1871, John Evans, trustee for the Denver Pacific Railway & Telegraph Company, conveyed the land to James Langston. By mesne conveyances the apparent title to the land vested in Perry C. Benson on April 6, 1904. Benson paid $1,375.00 cash for the land. When Benson acquired the same about five acres thereof had been cultivated. There was a fence around all of the land except a small portion on the mountain side. Benson began improving the land as soon as he bought it, by getting the timber off and grading down the ridges. He constructed ditches and head-gates for the irrigation of the land at an expense of $35.00 to $50.00 an acre. He moved the house and barn from one portion of the land to a more desirable portion at quite an expense. He built an implement shed, barn, hen house, cave, and cistern. These improvements were all completed before September 2, 1909. All the improved land has been cultivated since Benson owned it, sometimes by himself and at other times by renters. The land was all under irrigation prior to 1909, aside from a few high places. There was a house on the land when Benson bought it. The occupants vacated when he took possession; another man moved in as his tenant. The house on the land was occupied in 1907 and 1908. All the improvements were on the land in 1909 and are still there. Emma T. Krueger, the defendant, brought suit to eject Benson from the land which suit is still pending. On or about August 3, 1907, Benson received from Charles M. Krueger the following letter:

"August 3, 1907.

"Mr. P. C. Benson, Loveland, Colorado.

"DEAR SIR: Upon a search of the records, I find that you are the present owner of the W. ½ N. E. ¼ Sec. 17, Tp. 5 N., R. 69 West of the 6th P. M., and that the title thereto is imperfect.

"If you are sufficiently interested, I would be pleased to correspond with you relative to the matter and assist you in curing the defect.

"My charges will be reasonable.

"As to who I am, I would refer you to Messrs. Foote, Riner, Bartholf, James and others of your city.

"Respectfully,

"CHAS. M. KRUEGER."

Benson has paid the taxes upon the land ever since he bought it. The people living in the house on the land had beds, tables, chairs, and what a person not of the wealthy class ordinarily would have. Benson testified he saw such things in the house. He conversed with the people in the house during 1904, 1905, 1906, 1907, 1908, and 1910. When he bought the land in 1904 the agent of the company from which he bought the land was living there. At the trial it was stipulated as follows:

"By Act of Congress of July 2, 1862 (12 Stat. 489), Congress

granted to the Leavenworth, Pawnee and Western Railroad Company, a right of way over certain public lands, and also certain public lands to aid in the construction of said railroad. That under and by virtue of a certain Act of Congress of March 3, 1869, the Denver Pacific Railway and Telegraph Company became the owner of and entitled to all the rights and benefits so granted and conferred by said Act of Congress of July 2, 1862, and said company selected and definitely located its said right of way, on August 20, 1869, and so selected and definitely located and fixed its said right of way as to bring the lands involved in this suit within the primary limits of said grant. On April 13, 1866, Robert W. Woodward filed a certain valid pre-emption declaratory statement, numbered 2094, as provided for in the Act of Congress dated September 4, 1841, (5 Stat. 455), for the lands hereinabove described (unoffered lands), upon which final proof and payment was never made, that said declaratory statement was a valid and subsisting claim on August 20, 1869, and all rights under and by virtue of said pre-emption filing of said Woodward expired by operation of law on July 14, 1872, up to which date said filing was a valid and subsisting filing."

The defendant Emma T. Krueger testified that she paid Charles M. Krueger, her husband, $800.00 for an undivided one-half interest in the land; that she paid Mary N. McIntyre $1,500.00 for the other undivided one-half interest; that the $1,500.00 was paid by check dated April 22, 1913. The defendant also testified that at the time of making these payments she had no knowledge of the facts or circumstances connected with the application to enter the land; that the first time she saw this land was on March 27, 1913. The witness testified that she did not think it was necessary to send any one to look at the land before she bought it. The $400.00 paid her husband was in cash. John A. McIntyre testified that Charles M. Krueger was his attorney and acted for him in the matter of entering the land. There was other testimony given at the trial which it is not necessary to here produce. We are satisfied from an examination of all the evidence that the land was in the open and notorious possession of Benson at the time Moses applied to enter the same with soldiers' additional scrip; that the statement in the application and the non-mineral affidavit that the land was unoccupied and not in the adverse possession of any person other than the selector, was false to the knowledge of the persons applying to enter the land. We are of the opinion, therefore, that the patent should be set aside for the fraud committed against the United States, unless the defendant has shown that she is an innocent purchaser without notice of the fraud. United States v. Iron & Silver Mining Co., 128 U. S. 673; United States v. Minor, 114 U. S. 233.

No actual notice of the fraud has been shown, but counsel for the United States insist that the defendant had constructive notice by reason of the possession and occupancy of Benson, and the record of the claim of title from the Denver Pacific Railway & Telegraph Company to Benson as the same appeared in the office of the county clerk and recorder of Larimer County, Colorado, at the time she purchased an undivided interest from her husband, and also at the

time she purchased the other undivided interest from Mrs. McIntyre. The claim of counsel for the United States may be stated in this way: By Act of Congress of July 2, 1862 (12 Stat. 489), Congress granted to the Leavenworth, Pawnee & Western Railroad Company, a right of way over certain public lands, and also certain public lands to aid in the construction of said railroad. By Act of Congress of March 3, 1869, the Denver Pacific Railway & Telegraph Company became the owner of and entitled to all the rights and benefits so granted and conferred by said Act of Congress of July 2, 1862, and said last named Company selected and definitely located its right of way on August 20, 1869, and so selected and definitely located and fixed its said right of way so as to bring the land involved in this litigation within the primary limits of the grant.

On April 13, 1866, Robert W. Woodward filed a valid pre-emption declaratory statement No. 2094, as provided for in the Act of Congress, dated September 4, 1841 (5 Stat. 455), for the land involved in this suit, upon which final proof and payment was never made, that said declaratory statement was a valid and subsisting claim on August 20, 1869, and remained so until up to July 14, 1872. The pendency on August 20, 1869, of this pre-emption filing of Woodward prevented title to said land from vesting in the railroad company on that date. Kansas Pac. Ry. Co. v. Dunmeyer, 113 U. S. 629. Prior to this decision the Land Department in construing the grant of July 2, 1862, and other like grants had held that under circumstances similar to the case at bar title to such land vested in the railroad company immediately upon the cancellation or failure of such filing. Wagstaff v. Collins, 97 Fed. 3; United States v. Winona, etc. R. R. Co., 165 U. S. 463. It is claimed that relying upon this land office practice the beneficiaries under the grant, namely, the Denver Pacific Railway & Telegraph Co., sold the land in suit to one James Langston on April 5, 1871, and by subsequent conveyances the apparent title was vested in one Perry C. Benson as hereinbefore stated. By Section 5 of the Act of Congress of March 3, 1887 (24 Stat. 556), it is provided as follows:

"That where any said company shall have sold to citizens of the United States, * * * as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being coterminus with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the bona-fide purchaser thereof from said company to make payment to the United States for said lands at the ordinary government price for like lands, and thereupon patents shall issue therefor to the said bona fide purchaser, his heirs or assigns."

It is claimed that under and by virtue of said Section 5, Benson, the last holder of the title derived from the railroad company, had the right to purchase the land in question from the United States at the ordinary government price, on learning that his title from the railroad had failed, and that he could not know this until the Land Department had determined that the land had been excepted from

the operation of the grant. The third paragraph of rule 8 of the regulations of the Land Department for carrying into effect Section 5 of the Act of March 3, 1887, reads as follows:

"No entry will be allowed under this section until it shall have been finally determined by this department that the land was excepted from the grant." (Act of March 3, 1887, 8 L. D. 348; Miller v. Tacoma Land Co., 29 L. D. 633.)

The Commissioner of the General Land Office did not determine that the land in suit was excepted from the operation of the grant of July 2, 1862, and March 3, 1869, until April 8, 1910, when he decided that Moses was entitled to enter the land under his application of September 2, 1909. Until said date Benson had a right to assume that the land was his by virtue of his purchase from the railroad company. This being so, there was no duty cast upon him to secure a further title by purchase from the Government. Ramsey v. Tacoma Land Co., 196 U. S. 360; Miller v. Tacoma Land Co., 29 L. D. 633. The Land Department had no means of knowing that any one was occupying or claiming the land in suit under a deed from the railroad company or otherwise, unless and until such facts should be brought to its attention. To cover such situations the rules and regulations of the Land Department in force at the time Krueger caused to be filed in the Land Office the application of Moses required such applicant to make a showing as to whether or not any one was occupying the land applied for or claiming the same adversely to the selector. 36 L. D. 278. And the Land Department had a right to rely upon the applicant for this information. Leonard v. Lennox, 181 Fed. 761; United States v. Minor, 114 U. S. 238. Therefore, if the application of Moses to enter the land had stated that Benson was in possession or occupied the land, Benson would have been given notice of the application and he would have had the right to purchase the same under Section 5 of the Act of March 3, 1887. Miller v. Tacoma Land Co., 29 L. D. 633; Fox v. Petrun, decision by the Secretary March 12, 1914. It is further claimed that defendant was chargeable with the notice of the Act of March 3, 1887. Gertegens v. O'Connor, 191 U. S. 237; Ramsey v. Tacoma Land Co., 196 U. S. 360. It is now claimed that if the defendant before taking title to the land in suit and paying therefor had inquired of Benson or his tenants, she would have learned the fact that Benson claimed the land under a chain of title from the railroad company. Following up this information, as it is claimed she was bound to do, she would have learned the basis of the railroad company's claimed title—the grant of July 2, 1862, and the amendment thereto. She would have thereby come to a knowledge of the fact that Benson was not a trespasser upon the land, but that under the terms of Section 5 of the Act of March 3, 1887, he was lawfully entitled to retain possession of such land until it should have been determined by the Land Department that title thereto had not passed to the railroad company, and that upon the determination by the Land Department that the title to this land had not vested in the railroad company, Benson would have had under the terms of said Section 5 a preferential right to purchase

the land from the Government. Gertegens v. O'Connor, supra. It is claimed she would have further learned that the patent under which she was taking title had been issued without Benson being notified of the failure of his claimed title, and that in the application upon which such patent was based and in the affidavit which accompanied and supported it, it had ben represented and stated that the land in question was at the date of such application not occupied, adversely to the selector, and that it was unoccupied, unimproved, and unappropriated by any one other than the selector. This she would have already learned was contrary to the real facts. It is claimed that by reason of Benson's adverse possession defendant is chargeable with knowledge of all the facts above stated, and therefore is chargeable with a knowledge of the fraud upon the Government perpetrated by Krueger through Moses in the acquirement of the patent. Wood v. Carpenter, 101 U. S. 135; 2 Pomeroy's Equity Juris. Sec. 615; Kirby v. Tallmadge, 160 U. S. 379; Tate v. Pensacola G. L. & D. Co., 37 Fla. 439; Beattie v. Crewdson, 124 Cal. 577.

Of course if the defendant can be charged with notice with all the facts above stated, including the regulations of the Land Department and the decisions thereof construing Section five of the Act of March 3, 1887, she could not be held to be an innocent purchaser.

The difficult question in this case, however, is to determine how far Mrs. Krueger was obliged to travel into the transactions of the Land Department in her investigation of the title which she was about to purchase. In the consideration of this question we must not lose sight of the fact that Benson is not before the court asserting any right to the land in controversy. He has no controversy with the defendant Krueger in this action. The action is not brought by Benson, and on the face of the pleadings nothing appears that it is brought in his behalf. The facts hereinbefore stated as constituting the claim of counsel for the United States were not introduced in evidence for the purpose of showing that Benson had any right to relief in this action, but for the sole purpose of showing that the defendant Krueger had constructive notice of the fraud committed by her husband and his associates upon the Government when they entered the land. Consequently, it is not necessary to determine whether the rights of Benson as set up and claimed in this action are valid or not. The question to be decided upon this branch of the case is simply how far the occupancy of the land by Benson and the record of his claim of title would be constructive notice on the part of the defendant Krueger of the fraud committed in the entry of the land. She would, of course, by the possession and occupancy of Benson and the record of his title, be chargeable with constructive notice of all of Benson's rights whether she knew of his possession and occupancy as a matter of fact or not. But Benson is not asserting any right to the land in this action, and so his rights, whatever they are, are immaterial to the decision of this case.

Let us concede that the defendant Krueger must be charged with constructive notice of all of Benson's rights as claimed by

counsel for the United States. Can she by reason of that fact be charged with constructive notice that a regulation of the Land Department required proof that the land was unoccupied at the time of making entry thereof, and that Moses and McIntyre had sworn falsely before the Land Office at the time the land was entered. In Wood v. Carpenter, supra, the rule is stated as follows:

"Whatever is notice enough to excite attention and put the party on his guard and call for inquiry is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant of it. The presumption is that if the party affected by any fraudulent transaction or mangaement might, with ordinary care and attention, have seasonably detected it, he seasonably had actual knowledge of it."

If the contest here was simply between the defendant Krueger and Benson, it would not be difficult to determine the question. The defendant would be held to have had constructive notice of Benson's rights, but the difficulty arises when we come to use the occupancy of Benson, who is not here claiming any interest in the land, as a fact to charge Mrs. Krueger with the knowledge of the fraud in obtaining the patent. Although the question is not entirely clear, we are of the opinion that as the burden of proof rests upon the defendant to make out the defense of innocent purchaser, Boone v. Chiles, 10 Peters 117-211-212; Wright-Blodgett Co. v. United States, 236 U. S. 397-403-404-405; Stonebraker-Zea Cattle Co. v. United States (C. C. A.) 220 Fed. 99, Mrs. Krueger, at the time she purchased must be held to have had constructive notice of facts which if investigated would have led to a knowledge of the fraud.

The decree below is reversed and the case remanded with instruction to enter a decree as prayed by the United States.

Filed November 15, 1915.

(*Decree.*)

United States Circuit Court of Appeals, Eighth Circuit, September Term, 1915, Monday, November 15, 1915.

No. 4439.

UNITED STATES OF AMERICA, Appellant,

vs.

EMMA T. KRUEGER.

Appeal from the District Court of the United States for the District of Colorado.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Colorado, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court, in this cause, be, and the same is hereby, reversed without costs to either party in this Court.

It is further ordered that this cause be, and the same is hereby, remanded to the said District Court with directions to enter a decree for the United States as prayed for in its bill of complaint.

November 15, 1915.

(*Petition for and Order Allowing Appeal to Supreme Court U. S.*)

To the Honorable Judges of the United States Circuit Court of Appeals, Eighth Judicial Circuit:

The above-named appellee, Emma T. Krueger, respectfully shows that the above-entitled cause is now pending in the United States Circuit Court of Appeals for the Eighth Circuit, and that a judgment and decree has therein been rendered on the 15th day of November, A. D. 1915, reversing the decree of the District Court of the United States for the District of Colorado; that in the record and proceedings and also in the rendition of the judgment and decree, manifest error has intervened, to the great damage of the petitioner; that the jurisdiction of the District Court of the United States, for the District of Colorado, depended upon the fact that the suit is of a civil nature in equity brought by the United States; that the amount in controversy exceeds the sum of One Thousand Dollars ($1,000.00), beside interest and costs, and this is not a case in which the jurisdiction of the Circuit Court of Appeals is made final.

Wherefore, petitioner prays that an appeal be allowed her in the above-entitled cause, directing the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed by said appellee may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

WILLIAM V. HODGES,
Solicitor for Appellee.

Appeal allowed and bond fixed in the sum of $1,000.00, conditioned as the law directs, this the 3rd day of February, A. D. 1916.

WALTER H. SANBORN,
United States Circuit Judge for the Eighth Circuit.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Feb. 3, 1916.

(Assignment of Errors on Appeal to Supreme Court U. S.)

And now comes Emma T. Krueger, appellee, and makes and files this, her assignment of errors, and says that the decree and judgment entered by the Circuit Court of Appeals of the Eighth Circuit, in the above cause, on the 15th day of November, 1915, is erroneous and unjust:

First. Because the Court erroneously held and decided that possession of the premises by Benson, at the time of the purchase of the same by Emma T. Krueger, for a valuable consideration, innocently, and without notice or knowledge of any fraud practised by her predecessors in title on the United States, constituted in equity constructive notice to Emma T. Krueger of such fraud, so alleged to have been practised by her predecessors in title.

Second. Because the Court erred in holding and deciding that Emma T. Krueger was not an innocent purchaser for value of the premises in suit, and not entitled to maintain such title against the United States, complainant in said suit.

Third. Because the Court erred in using the occupancy of Benson as a fact to charge Emma T. Krueger with the knowledge of the fraud in obtaining the patent.

Fourth. Because the Court erred in holding and deciding that the defendant, Emma T. Krueger, did not make out the defense of innocent purchaser.

Fifth. The Court erred in holding that the record of Benson's title and his occupancy charged Emma T. Krueger with constructive notice of any alleged right of Benson, or of any alleged fraud of her predecessors in title, because there is no evidence to show that Langston, the purchaser from the Railroad Company, was a citizen of the United States, or had declared his intention to become such, or that Langston was a bona fide purchaser, all as provided by Section 5, Act of Congress, March 3, 1887.

Sixth. The Court erred in holding that there was fraud in the affidavits of Moses and McIntyre, when they stated on September 2, 1909, that the land was not occupied adversely to the selector, because there is no evidence to show Benson other than a trespasser on the land; and there being no evidence to show that Langston, the purchaser from the railroad company, was a citizen of the United States, or had declared his intention to become such citizen, or was a bona fide purchaser, all as provided by Section 5, Act of Congress, March 3, 1887.

Seventh. The Court erred in holding that the chain of title of Benson, or his occupancy, was effective for any purpose, because there is no evidence showing that the deed from the railroad company to Langston was on record at the time Emma T. Krueger purchased the property.

Eighth. Because the Court erred in holding that the alleged possession and occupancy of Benson and the alleged record of his title charged Emma T. Krueger with constructive notice of all of Benson's

rights and with constructive notice that a regulation of the Land Department required proof that the land was unoccupied at the time of making entry thereof, and that Moses and McIntyre had sworn falsely before the Land Office at the time the land was entered.

Ninth. Because the Court erred in holding and deciding that Mrs. Krueger, at the time she purchased, must be held to have had constructive notice of facts which if investigated would have led to a knowledge that a regulation of the Land Department required proof that the land was unoccupied at the time of making entry thereof, and that Moses and McIntyre had sworn falsely before the Land Office at the time the land was entered.

Tenth. Because the Court erred in reversing the decree entered by the District Court of the United States for the District of Colorado.

Eleventh. Because the Court erred in instructing the Court below to enter the decree as prayed by the United States.

Twelfth. Because of divers, manifest errors committed by the Honorable, The Circuit Court of Appeals of the Eighth Circuit, in the decision on the appeal to that Court herein, and the entry of judgment thereon.

Wherefore, appellee prays that said decree of the Honorable Circuit Court of Appeals of the Eighth Circuit be reversed, and that the proper decree be rendered; and for such other and further relief as to the Court shall seem meet and proper.

WILLIAM V. HODGES,
Solicitor for Appellee.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Feb. 3, 1916.

(Bond on Appeal to Supreme Court U. S.)

Know all men by these presents, That we, Emma T. Krueger, as principal, and The Aetna Accident and Liability Company, of Hartford, Connecticut, as surety, are held and firmly bound unto the United States of America, in the sum of $1,000 to be paid to the United States of America, to the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 28th day of January, A. D. 1916.

Whereas, the above-named Emma T. Krueger has prosecuted an appeal to the Supreme Court of the United States, to reverse the decree rendered and entered in said cause in the Circuit Court of Appeals for the Eighth Circuit on the 15th day of November, 1915.

Now, therefore, the condition of this obligation is such that if the said Emma T. Krueger shall prosecute her said appeal to effect and answer all damages and costs if she fail to make said appeal good,

that this obligation shall be void; otherwise to remain in full force and virtue.

EMMA T. KRUEGER. [SEAL.]
THE ÆTNA ACCIDENT AND LIABILITY COMPANY,
By JOHN R. GEMMILL, [SEAL.]
Resident Vice-President.

Attest:
EARL R. ROSS,
Resident Secretary.

Approved this 3rd day of February, 1916.

WALTER H. SANBORN,
United States Circuit Judge for the Eighth Circuit.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Feb. 3, 1916.

(Stipulation as to Amount in Controversy.)

It is hereby stipulated and agreed, by and between the above-named parties, by their respective counsel, that the amount in controversy in this case exceeds the sum of One Thousand Dollars ($1,000.00), exclusive of interest and costs.

HARRY B. TEDROW,
United States District Attorney for the District of Colorado.
WILLIAM V. HODGES,
Solicitor for Appellee.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Feb. 3, 1916.

(Præcipe for Transcript on Appeal to Supreme Court U. S.)

To the Clerk of said Court:

You will please prepare and duly authenticate a transcript of the record in the above-entitled cause for appeal to the Supreme Court of the United States in accordance with Equity Rule No. 76, to-wit:

1. Complete transcript of record on appeal from District Court of the United States for District of Colorado.
2. All proceedings in the Circuit Court of Appeals.
3. Opinion, order, judgment and decree of Circuit Court of Appeals, Eighth Circuit.
4. Petition for appeal and order allowing appeal to Supreme Court.
5. Assignment of Errors.
6. Order fixing bond.
7. Stipulation as to amount in controversy.

8. Bond on Appeal.
9. Præcipe for transcript on appeal.
10. Certificate of Clerk.
11. Citation.

WILLIAM V. HODGES,
Solicitor for Emma T. Krueger.

Service of a copy of the above and foregoing præcipe is hereby acknowledged this 22nd day of January, A. D. 1916.

HARRY B. TEDROW,
United States Attorney for the District of Colorado.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Feb. 3, 1916.

In the United States Circuit Court of Appeals for the Eighth Judicial District.

United States of America to the United States of America and to Harry B. Tedrow United States District Attorney, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at the City of Washington, D. C. thirty days after the date of this citation pursuant to an appeal allowed and filed in the clerk's office of the United States Circuit Court of Appeals, for the Eighth Circuit, in a cause wherein Emma T. Krueger is appellant and you are the appellee, to show cause, if any there be, why the decree rendered against the said appellant as in said appeal mentioned should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Walter H. Sanborn, Presiding Judge of the United States Circuit Court of Appeals for the Eighth Circuit this 3rd day of February, A. D. 1916.

WALTER H. SANBORN,
Presiding Judge United States Circuit Court of Appeals, Eighth Circuit.

Service of a copy of the above and foregoing citation is hereby acknowledged by and on behalf of appellant, United States of America, this 5th day of February, A. D. 1916.

HARRY B. TEDROW,
United States District Attorney.

[Endorsed:] No. —. United States Circuit Court of Appeals, Eighth Circuit. United States of America, Appellant, vs. Emma T. Krueger, Appellee. Citation on Appeal to Supreme Court U. S. Filed Feb. 7, 1916. John D. Jordan, Clerk. William V. Hodges, Attorneys for Appellee.

(*Clerk's Certificate.*)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the District of Colorado as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein United States of America is Appellant and Emma T. Krueger is Appellee, No. 4439, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that the original citation with acknowledgment of service endorsed thereon is hereto attached and herewith returned.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this sixteenth day of February, A. D. 1916.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled Feb. 16, 1916. John D. Jordan.]

Endorsed on cover: File No. 25,158. U. S. Circuit Court Appeals, 8th Circuit. Term No. 394. Emma T. Krueger, appellant, vs. The United States. Filed February 28th, 1916. File No. 25,158.

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In the Supreme Court of the United States.

OCTOBER TERM, 1916.

No. 394.

EMMA T. KRUEGER,
APPELLANT,

Against

THE UNITED STATES,
APPELLEE.

BRIEF FOR EMMA T. KRUEGER, Appellant.

Statement.

This is an appeal from the judgment and decree of the Circuit Court of Appeals, for the Eighth Circuit, dated November 15, 1915, reversing the decree of the District Court of the United States for the District of Colorado.

The suit was originally brought in equity in the United States District Court for the District of Colorado by the United States of America to cancel a certain patent issued by the United States on June 6th, 1910, to one William E. Moses, which patent covers the West half of the Northeast quarter, Section Seven-

teen, Township 5 North, Range 69 West, 6th P. M., containing eighty (80) acres situated in Larimer County, Colorado.

The above-described land was, prior to April 13, 1866, subject to pre-emption under the land laws of the United States. By Act of Congress of July 2, 1862 (12 Stat., 489), Congress granted to the Leavenworth, Pawnee and Western Railroad Company, a right of way over certain public lands, and also certain public lands to aid in the construction of said Railroad. By virtue of an Act of Congress of March 3rd, 1869, the Denver and Pacific Railway and Telegraph Company became the owner of and entitled to all such rights and benefits so granted to the Leavenworth, Pawnee and Western Railroad Company, and on August 20, 1869, selected and located the right of way. This selection and location brought the lands involved in this suit within the primary limits of the original grant.

On April 13, 1866, more than three years before the selection and location by the Denver and Pacific Railway & Telegraph Company, and at a time when the said land was open to pre-emption under the Act of Congress dated September 4, 1841 (5 Stat., 455), (Compiled Statutes 1916, section 4875) one Robert W. Woodward filed a valid pre-emption declaratory statement, numbered 2094, as provided by said Act of 1841. This declaratory statement was a valid and subsisting claim on August 20, 1869, when the Denver and Pacific Railway and Telegraph Company fixed the right of way which purported to include these lands within their grant, and said declaratory statement continued to be a valid and subsisting claim upon these lands until July 14, 1872, at which

date the pre-emption filing of the said Woodward expired by operation of law. On April 5, 1871, while the said pre-emption filing of Woodward was still in force, John Evans, trustee for the Denver and Pacific Railway & Telegraph Company assumed to convey the land to James Langston, and finally, on April 6th, 1904, by mesne conveyances, whatever right or interest Langston had, became vested in Perry C. Benson.

By Act of Congress on March 3, 1887 (24 Stat., 557), Compiled Statutes 1916, section 4899, it was provided:

> "Sec. 5. That where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the bona fide purchaser thereof from said company to make payment to the United States for said lands at the ordinary government price for like lands, and thereupon patents shall issue therefor to the said bona fide purchaser, his heirs or assigns."

On September 2nd, 1909, one William E. Moses filed in the local land office at Denver, Colorado, an application to enter the land above described by the use of soldiers' additional homestead scrip. In his application the said Moses stated that he was not acquainted with the character of the land, but that the same was unoccupied and unimproved by any per-

son claiming the same other than himself; and the application was also accompanied by the non-mineral affidavit of one John A. McIntyre, who affirmed that he was well acquainted with the character of the land, and that it was not in any manner occupied adversely to the selector.

At the trial, there was considerable evidence introduced to the effect that at the date when McIntyre's affidavit was made the land was actually unoccupied, unimproved and unappropriated, but the trial court found that on said date the land was in fact occupied, improved and appropriated on behalf of one Perry C. Benson, in whom whatever right or interest Langston had, became vested on April 6, 1904, and consequently that the patent to Moses was fraudulently obtained by means of false affidavits.

It was found by the trial court that Moses made the application to enter the land at the request of one Charles M. Krueger to whom Moses had sold the additional scrip, on which the land was entered, for $780.00, and to whom he conveyed the land on April 15th, 1910.

On April 22, 1910, Charles M. Krueger, for $800.00 in cash, conveyed an undivided one-half interest in the land to Emma T. Krueger, his wife, the defendant in the instant action to set aside the patent, and the other undivided one-half interest to Mary N. McIntyre, the sister of Emma T. Krueger and wife of John A. McIntyre. On April 22nd, 1913, Mary N. McIntyre conveyed her undivided one-half interest in the land to Mrs. Krueger, for which conveyance Mrs. Krueger paid her $1,500.

No evidence was introduced at the trial tending to show that Mrs. Krueger had actual knowledge or

notice of the fraud used in obtaining the patent, and the only question now presented is whether or not she had *constructive* notice of such fraud. The trial court held that the possession of Benson, while constructive notice to Mrs. Krueger of the extent and character of Benson's claim, was not constructive notice to her of any fraud exercised in the procurement of the patent, and that consequently Mrs. Krueger had established the defense of innocent purchaser for value, inasmuch as she had neither actual notice of the fraud nor constructive notice through the possession of the land by Benson.

The Circuit Court of Appeals for the Eighth Circuit reversed the decree of the lower court, and held that the said Mrs. Krueger, the appellant herein, had constructive notice arising from Benson's possession, that the patent was fraudulently obtained, and had consequently not established the defense of innocent purchaser.

It is from this judgment and decree of the United States Circuit Court of Appeals for the Eighth Circuit rendered on the 15th day of November, 1915, and reversing the decree of the District Court of the United States for the District of Colorado, that the appellant now appeals.

The Bill of Complaint charges that Charles M. Krueger, with intent to defraud the United States, and in accordance with an agreement with one William E. Moses, on or about September 2, 1909, caused Moses to file in the United States Land Office in Denver, Colorado, an application to enter the lands in suit by the use of soldiers' additional homestead scrip, and that in furtherance of such fraud, Krueger caused one John A. McIntyre to make and file in such land

office a supporting affidavit concerning such lands; that in such application, it was stated and represented that the lands were unoccupied, unimproved and unappropriated by any person claiming the same other than the selector; that in such supporting affidavit it was stated and represented that the lands were not in any manner occupied adversely to the selector; that the land officials relying upon such statements and representations on April 8, 1910, issued to Moses the certificate of the register, and on June 6, 1910, a patent to Moses embracing the lands; that pursuant to the original arrangement between Moses and Krueger, on April 15, 1910, Krueger conveyed to his wife, Emma T. Krueger, defendant herein, and Mary N. McIntyre, the wife of John A. McIntyre, who made such supporting affidavit, each an undivided one-half interest therein; that on April 22, 1913, Mary N. McIntyre reconveyed said undivided one-half interest in such lands to defendant Emma T. Krueger; that at the time of the making and filing of such application and affidavit and for several years prior thereto, the lands covered thereby had been in the open, notorious and exclusive possession of one Perry C. Benson, under color of title deraigned from the Denver Pacific Railway and Telegraph Company (which was substituted to all the rights and benefits previously conferred by Act of Congress of July 2, 1862, upon the Leavenworth, Pawnee & Western Railroad Company), which company claimed under a land grant from Congress of July 2, 1862.

SPECIFICATION OF ERRORS.

First. The Court erred in using the possession of Benson as a fact to charge Emma T. Krueger with the knowledge of the fraud in obtaining the patent.

Second. The Court erred in holding and deciding that the defendant, Emma T. Krueger, did not make out the defense of innocent purchaser.

Third. The Court erred in holding that the record of Benson's title and his occupancy charged Emma T. Krueger with constructive notice of any alleged right of Benson, or of any alleged fraud of her predecessors in title, because there is no evidence to show that Langston, the purchaser from the Railroad Company, was a citizen of the United States, or had declared his intention to become such, or that Langston was a bona fide purchaser, all as provided by Section 5, Act of Congress, March 3, 1887.

Fourth. The Court erred in holding that there was fraud in the affidavits of Moses and McIntyre, when they stated on September 2, 1909, that the land was not occupied adversely to the selector, because there is no evidence to show Benson other than a trespasser on the land.

Fifth. The Court erred in reversing the decree entered by the District Court of the United States for the District of Colorado, and in instructing the Court below to enter the decree as prayed by the United States.

The defendant (the appellant herein) contends:

1. Possession of the premises by Benson at the time of the purchase of the same by Emma T. Krueger,

for a valuable consideration, innocently and without notice or knowledge of any fraud practiced by her predecessor in title on the United States, did not constitute in equity constructive notice to the said Emma T. Krueger of such fraud so alleged to have been practiced by her predecessors in title.

2. Emma T. Krueger was an innocent purchaser for value of the land in controversy and entitled to maintain such title against the United States, the complainant in this suit.

3. Since there is nothing in the record to show that Langston, the purchaser from the Railroad Company, was a citizen of the United States, or had declared his intention to become such, or was a bona fide purchaser, as provided by Section 5, Act of Congress, March 3rd, 1887, the record of Benson's title and his occupancy did not charge the defendant herein with constructive notice of any right of Benson, because the absence of these circumstances prevent Benson from having any valid interest in the said land.

4. The original affidavits to the effect that the land was not "adversely occupied," in reliance upon which the patent was issued, were not false because a mere trespasser is not an adverse occupant within the meaning of the land office requirement.

5. The judgment and decree appealed from should be reversed, and the original Bill of Complaint should be dismissed.

SUMMARY OF ARGUMENT.

(a) Benson's possession could not constructively charge Mrs. Krueger with notice of anything except the right, title, and interest which Benson actually

had, or with information which she could by means of ordinary diligence have obtained concerning his right to the land. Had she actually known of his possession, she would merely have been put on inquiry as to the extent of his right, and upon discovering that he did not in fact have any right, title or interest, she would have been justified in purchasing the land. The rationale of the rule that "possession is constructive notice" is to protect the possessor, and if he has no right or interest to be protected, there is no necessity for applying the rule. In the instant case, Benson was nothing more than a trespasser, and had no right in the premises. Consequently, his possession did not put a purchaser on inquiry.

(b) Even if Langston had purchased the land from the railroad after Woodward's declaratory statement had become invalid, it is conceived that Benson had no perfected right or interest in the land. At most he had only a privilege to exercise a right of purchase under the act of 1887, and his possession of the property having put Mrs. Krueger upon inquiry, she would have ascertained upon investigation that Benson had no right or interest in the property. She would have learned that he might have obtained a right, had he taken advantage of the privilege granted by the act of 1887, but she would also have learned that he had *not* taken advantage of the act. Having ascertained this absence of interest in the land, she would have been justified in purchasing the property without any imputation that she had knowledge of the fraud practiced to obtain the patent.

(c) And even if her investigation had disclosed a valid right in Benson, by reason of the act of 1887,

existing at the time of her purchase of the property, the possession at that time would not charge her with notice of possession previous to such purchase; and unless she is charged with knowledge of possession at the time of the issuance of the patent, she could not possibly be charged with constructive notice of the fraud, even if it could be held that she is bound to know that an affidavit of no possession was made, or that the patent would not issue without such affidavit.

(d) Inasmuch as Benson had no right, title or interest in the land at the time of the issuance of the patent, he was not an "adverse occupant" of such land within the meaning of the land office requirements, and the affidavits were not false.

POINT I.

Possession of land by an adverse holder does not constitute in equity constructive notice to an innocent purchaser for a valuable consideration that fraud has been practiced on the United States by the purchaser's predecessor in title in obtaining patent to such land.

There can be no doubt that a purchaser from a patentee, or those holding under him is not required to go behind the patent; and to know that the steps necessary as conditions precedent to the issuance of such patent have all been regularly taken.

In the instant case a patent had been issued by the United States. Mrs. Krueger knew that such a

patent had been issued and was justified in assuming that the title was valid.

See *United States vs. Laam* (1906), 149 Fed., 581,

where the Circuit Court of Appeals, at page 585, adopted and approved the following language of the Supreme Court of Wisconsin:

> "A patent being the highest evidence of title from the government, and presumptively valid, the purchaser from the patentee or those holding under him, is not required to go behind it, and to know that the previous steps to justify the making of it have been regularly taken."

Mrs. Krueger was not bound to hunt for grounds of doubt, and in order to set the patent aside the United States must charge her with notice of the original fraud.

See *United States vs. Detroit Timber & Lumber Co.*, 131 Fed., 668.

In *United States vs. Clark* (1905), 200 U. S., 601,

the court refused to set aside a patent, although the land had been conveyed to the purchaser before the patent had actually issued, the court saying, at page 607:

> "We may assume for the purposes of decision, * * *, that the original frauds are made out, although there is a great amount of testimony as to good faith. But the point of law just stated has been disposed of by *United States vs.*

> *Detroit Timber & Lumber Co.*, 200 U. S. 321. The United States is attempting to upset the legal title. In order to do that it must charge Clark with notice of the original frauds."

And continuing at page 609:

> "We cannot infer fraud merely from more or less familiar relations between some of Clark's agents and Cobban. When suspicion is suggested it is easily entertained. But bearing in mind, as was said in *United States vs. Detroit Timber and Lumber Co., supra*, that Clark *was not bound to hunt for grounds of doubt*, and recurring to the canons of proof laid down by the decisions, and to the findings of the courts below, we are of opinion that the decree dismissing the bill must be affirmed." (Italics ours.)

It is admitted that Mrs. Krueger holds under patent title, which she alleged that her grantors "conveyed to her by good and sufficient deeds and upon good consideration," and the trial court was well satisfied of her good faith, as shown by its finding from the evidence.

If Benson or his tenants were actually in possession of the land at the time of the purchase by Mrs. Krueger, it may be conceded that she is chargeable with notice of such possession, but there is nothing in that circumstance or any inquiry which might be induced thereby, which would give her notice of the alleged fraud upon the United States.

Such possession was only notice to Mrs. Krueger of the extent and character of the claim of the possessor himself, not of defects in the title of her predecessor in title.

See *Suiter vs. Turner*, 10 Iowa, 517 at 524.

> "And in this connection we may remark, that while possession is notice, at least so far as to put the vendee upon inquiry to ascertain by what right the occupant holds, this rule is not extended so far as to give notice of the *defects* existing in his title, nor yet of the defects in the title paramount to the person in possession." (Italics ours.)

See 2 *Minor, Real Property*, Section 1413, where it is said:

> "Where the adverse claimant is *in the actual possession and occupancy* of the land, or any part thereof, when the subsequent purchase occurs, the subsequent purchaser is, independently of statute, deemed to have constructive notice of the title under which such claimant occupies the premises. If, however, such adverse possession is under a title of record, it is not notice of any rights other than those that appear in the record, the subsequent purchaser, being justified in ascribing the occupant's possession to his *record title*."

The same rule is expressed by Mr. Pomeroy in his work on Equity Jurisprudence.

2 *Pom. Eq. Juris.*, Sec. 615, in the following language:

> "The general rule is well settled in England that a purchaser or encumbrancer of an estate who knows or is properly informed that it is in the possession of a person other than the vendor or mortgagor with whom he is dealing is thereby charged with a constructive notice of all the interests, rights and equities which such possessor

> may have in the land. * * * The same general rule based upon the same motives and reasons, has been established in the United States by a very great number of decisions and judicial dicta. In by far the larger portion of English cases, the possession has been that of a tenant or lessee, while in this country the instances of notice by mere tenancy are comparatively few."

and in Section 615:

> "In the first place, it is clearly established by many decisions of the highest authority that an actual, open, visible and exclusive possession of a definite tract of land by one rightfully in possession or holding under a valid title is constructive notice to subsequent purchasers and encumbrancers of whatever estate or interest in the land is held by the occupant, *equivalent in its extent and effect to the notice given by the recording or registration of his title.*" (Italics ours.)

And later:

> "The notice therefore upon the same motives of expediency is made as absolute as in the case of a registration."

It is readily apparent that this rule of law implying notice from an adverse possession was invented (1) in order to protect lessors or tenants of a grantor who conveyed property without actually informing the grantees of the leases, or (2) to protect owners of property who had failed to register their deeds.

Obviously, however, in the case of possession adverse to a grantor, such possession only charges the grantee with knowledge similar to that which he

would have had, if the adverse possessor had not neglected to register his title. If such adverse possessor is not a tenant and does not (1) hold under or from the grantor, and (2) has not title which he could register, there is nothing in the rule that possession is constructive notice of the possessor's title which is applicable.

This is exactly the situation in respect to the land purchased by Mrs. Krueger. Any right which Benson had was certainly not derived through or from Mrs. Krueger's grantor, and it is submitted that actual notice of Benson's title is of no materiality, for the simple reason that he had no valid title to record.

See *Burt vs. Baldwin* (1879), 8 Nebr., 487 at 494:

> "It will not be claimed that actual possession either by party in person, or by his tenant, is constructive evidence of a fact which does not exist."

And at page 491:

> "It may be stated that an unrecorded deed of land will prevail against a subsequent purchaser or mortgagor with notice. But such deed must be perfect so as to convey title to the grantee."

To the same effect it is said by the Court in

Roll vs. Rea (1888), 50 N. J. L., 264; 12 Atl., 905 at 907, that:

> "Notice by possession never extends beyond the rights of the occupant, and of those under whom he pretends to hold."

In *Munn vs. Bergess* (1873), 70 Ill., 604, at 614 it is said:

> "So far as actual notice resulting from the possession of Standart and Hughes, is concerned, it is sufficient to say they claimed under one Selever, whose claim was adverse to that of the complainants as well as the defendants. *Their possession was notice of the extent and character of their claim, but nothing more.*" (Italics ours.)

And at page 615:

> "We feel, therefore, constrained to hold that the defendants, owning the property at the commencement of the suit, were purchasers in good faith, without notice, actual or constructive, of the equities claimed by the complainants. Being such, it would necessarily follow that they cannot be held responsible for the irregularities charged, and their titles should be protected."
>
> *Lloyds vs. Karnes*, 45 Ill., 62, at page 72.

Even if the contention of the United States in respect to the fraud alleged to have been committed by the defendant's predecessors in title be correct, and that the patent was consequently subject to be set aside so long as it remained their property, nevertheless as against the United States, by whom the patent was issued, the purchaser was not bound to search behind it. She was justified in assuming that the duly executed instrument of the United States was valid, and since she was an innocent purchaser of such patent for a valuable consideration, the voidable title in the hands of her predecessors in title becomes absolute in her.

See *Perkins vs. Hays*, 3 Cooke's Reports (Tenn.), 163.

In this case a land warrant had issued under the laws of North Carolina to the heirs of John Grinder, a soldier of the Revolutionary War. At the time of his death, he left a widow and two sons. A woman named Sarah Grinder falsely representing herself to be his only heir, assigned the warrant to the defendant Hays, who made an entry and procured a grant of land. Joshua Grinder, one of the sons, sold his interest to his brothers, who in turn sold the interest to the complainant. It was urged by the complainant (at page 965):

> "That if the court should be of opinion, in a case like the present, a purchaser without notice would be protected, yet here was enough to put him upon inquiry; because by tracing the title, as the purchaser ought to have, back to the commencement, he could easily have ascertained that Sarah Grinder had no right to make the assignment on the warrant; which constructive notice, it was contended, was sufficient to protect the equity of the complainants."

The court held (page 168):

> "And, indeed, I have no hesitation in saying that when a man is about to purchase a legal title, he is not bound to inquire further back than the grant, and no sort of necessity devolves upon him to make any inquiry about either the entry or warrant."

And on page 174:

> "We are of opinion the defendants were not bound, nor can they be presumed to have exam-

ined this title any further back than the grant to Hays; there the legal title commences, and their inquiry into the title of Hays, we are to presume, stopped. Again, suppose them bound to examine the warrant, it would only show an assignment from Sarah Grinder; but whether she was an heir or not, they would be unable to ascertain."

In *Phillips vs. Buchanan Lumber Co.*, 151 N. C., 519; 66 S. E., 603, the complaint alleged that a party by fraud procured a certificate from the entry-taker of Graham County, that he was the assignee of another. The court said (page 603):

> "The plaintiffs admit in their brief that these subsequent grantees were all purchasers without notice, but contend that they were fixed with constructive notice of the fraud because by tracing the title back they would have seen that the grant was issued to Slaughter upon the certificate of assignment of the entry; but such assignment is not per se presumption of fraud, and, if the grantees had traced their title back to the grant, they would have found, duly recorded, the certificate of the entry taker of Graham County, etc."

The most notice that knowledge of any possession by Benson could impute to Mrs. Krueger would be of the facts or circumstances that she might have learned by making inquiry of Benson.

Losey vs. Simpson, 11 N. J. Eq., 246 at 255.

> "But of what was Kanause's possession notice? It was notice only of the legal or equitable interest which he assumed or claimed in the

land; and the greatest extent to which it can be carried is to visit the purchaser with notice of every fact and circumstance which he might have learned by making inquiry of the possessor."

See *Runyan vs. Snyder* (1909), 45 Colo., 156 (100 Pac., 420), page 162.

"When plaintiff acquired the premises by purchase defendants were in possession. Plaintiff therefor was charged with knowledge, or notice of their rights, if any. When plaintiff sought to ascertain what defendants' claim was he discovered, as the trial court found, that they were merely trespassers and had no rights whatever. Being trespassers they were not entitled to notice to quit before this action was brought and had no rights whatever that they can assert against plaintiff's title."

In the instant case Benson was an absolute stranger to Mrs. Krueger's title. So far as she could have learned by inquiry, he was a trespasser and had no rights whatever, and there is no evidence to show that Benson knew that a fraudulent affidavit had been made at the time Mrs. Krueger purchased the land.

It is impossible to conceive how the possession of Benson, a man who had no valid right or title to the land, can by any parity of reasoning, be held to be constructive notice to Mrs. Krueger that her predecessors in title had made fraudulent representations in obtaining a patent from the United States.

It is submitted therefore that the alleged possession and occupancy of Benson and the alleged record of his title did not charge defendant with constructive notice that the land department required proof that the land was unoccupied at the time of the making

entry thereof, and that Moses and McIntyre had sworn falsely before the Land Office at the time the land was entered.

POINT II.

Emma T. Krueger was an innocent purchaser for value of the land in controversy and entitled to maintain such title against the United States, the complainant in this suit.

The claim of the United States, the Complainant herein, is based entirely upon the contention that the defendant's grantor obtained title to the property in question by fraud for which the government claims to have the same right to demand a cancellation of the patent, as a private individual induced to make a deed by fraud.

It is not claimed that the patent issued to the defendant's predecessors in title was void, but that it was voidable in the hands of the original patentee or of a purchaser with notice.

It has not been contended that a purchaser without actual or constructive notice of such fraud would not have an unimpeachable title.

It should be borne in mind that in this suit it is the United States who is claiming to have been defrauded and that there are no rights of third parties involved. The matter to be determined is whether the legal title should remain in Mrs. Krueger, or the patent be cancelled and title restored to the United States—not whether the legal title should go to a third party. To accomplish this result, the govern

ment must establish the fraud by clear and convincing proof.

See *United States vs. Iron Silver Mining Co.* (1888), 128 U. S., 673,

where Mr. Justice Field in delivering the opinion of the Court, used this language (page 676):

> "The burden of proof in such cases is upon the government. The presumption attending the patent, even when directly assailed, that it was issued upon sufficient evidence that the law had been complied with by the officers of the Government charged with alienation of public lands can only be overcome by clear and convincing proof."

And in the same opinion, Mr. Justice Field cited with approval the following statement from the *Maxwell Land Grant Case* (1886), 121 U. S., 325, 379, 381:

> "'We take the general doctrine to be, that when in a court of equity it is proposed to set aside, to annul or to correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt. If the proposition, as thus laid down in the cases cited, is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul the grants, the patents, and other solemn evidences of title emanating from the government of the United States under its official seal. In this class of cases, the respect due to a patent, the presumptions that all the preceding steps required by the law had been observed before its

> issue, the immense importance and necessity of the stability of titles dependent upon these official instruments, demand that the effort to set them aside, to annul them, or to correct mistakes in them, should only be successful when the allegations on which this is attempted are clearly stated and fully sustained by proof.'"

There was no evidence whatsoever presented tending to show that Mrs. Krueger had any knowledge of the fraud in obtaining the patent, it being said by the trial court (folio 60):

> "There being no evidence here that she had any knowledge whatever of the fraud in obtaining the title, she stands in the relation of a *bona fide* purchaser."

and again Folio 59:

> "Mrs. Krueger comes upon the stand—she was a fair witness; I saw nothing in her testimony where she tried to evade answering fully, and fairly stated that she paid actually in cash both to her husband and the other party, and swore positively she had no knowledge of this transaction prior to that. I do not think she is chargeable with notice. If you are able to show and bring home to her any knowledge of these transactions prior to her purchase, then I can see at once that the patent should be set aside and she will be charged with notice. I think to set aside a patent that is in the hands of an innocent purchaser, as she seems to be, under her testimony, the government must bring knowledge home direct to her. You are trying to set aside a patent on the ground of fraud. She must be a party to, or have notice of, that fraud. She had no knowledge whatever of it, and she said she did

not. She did not even know anything about the land at the time it was purchased. I do not think it is her duty to examine the land. She found out after she bought the land that there was something there. She must have some knowledge before the conveyance. The testimony is that she did not."

Consequently, Mrs. Krueger must be considered an innocent purchaser for value, because it must be conceded that she had no actual knowledge of the fraud, and because even if Benson had actual possession sufficient to constructively charge her with knowledge of his right, title and interest in the land, such possession did not charge her with knowledge of the fraud connected with issuance of the patent. Such possession cannot be regarded as constructively charging her with any knowledge which she would not have been reasonably charged with if she had actually known of such possession.

Had Benson actually been in possession and had Mrs. Krueger in fact known of such possession at the time she purchased the land, she would at most have been charged only with notice of the fact that Benson was in possession in 1904, that he was still in possession when she took her deed, and that under a law of the United States he could, if his apparent title came direct from the Railroad, have purchased the land for $2.25 an acre, and obtained patent, and with further notice that he had not exercised that right, and that the government had issued a patent.

The distinction between notice of these things and notice of the fraud committed against the United States is readily apparent, and there is nothing in the record to indicate that the most diligent inquiries

made to Benson himself would have divulged the fact that the patent had been procured by means of false affidavits.

POINT III.

Since there is nothing in the record to show that Langston, the purchaser from the railroad company, was a citizen of the United States, or had declared his intention to become such, or was a bona fide purchaser, as provided by Section 5, Act of Congress, March 3rd, 1887, the record of Benson's title and his occupancy did not charge Emma T. Krueger with constructive notice of any right of Benson, because the absence of those circumstances prevents Benson from having any valid interest in the said land.

The Act of Congress of March 3, 1887, Section 5, as quoted in the statement of facts, *supra*, provides:

> "That where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of the grant,"

certain rights may attach. It is only under this Act of Congress that Benson could have any rights whatever other than those of a trespasser. His possession of the property could be constructive notice to Mrs. Krueger only of rights that were given him by this Act. And yet nowhere in this record, in pleadings, evidence, or abstract of title, is there anything to show that Langston, the purchaser from the railroad com-

pany, was "a citizen of the United States or had declared his intention to become such citizen."

Such fact of citizenship or declaration of intention to become a citizen is an essential element in the right given by Congress to purchase such lands, and in the absence of which no such right of purchase existed.

> See *Ramsey vs. Tacoma Land Co.* (1904), 196 U. S., 360.

Where Mr. Justice Brewer indicated that the necessity of compliance with the citizenship requirement in the Act of 1887 was beyond question, when he said, at page 362:

> "Plaintiff in error presents but two questions which have not already been determined by this Court. One is whether a state corporation is entitled to the benefit of Section 5 of the Act of 1887 which *names as beneficiaries* 'citizens of the United States,' or 'persons who have declared their intention to become such citizens.' This can scarcely be considered a debatable question, for in United States vs. Northwestern Express Company, 164 U. S. 686, similar language in the Indian Depredations Statute was adjudged broad enough to include a state corporation."

> See *Miller vs. Tacoma Land Co.* (1900), 29 L. D., 633, 634.
>
> *Gertgens vs. O'Connor*, 191 U. S., 237, 241.

It appears from the record, and has not been disputed, that R. W. Woodward filed a valid pre-emption declaratory statement upon the land in controversy on April 13, 1866; that such pre-emption declaratory

statement remained valid and in force and effect as a valid filing until July 14, 1872. Moreover, it is not disputed that the deed from the railroad to Langston was made on April 5, 1871, at a time when the Woodward filing was valid, and at that time the railroad had no right, title, or interest in the land.

The Act of March 3rd, 1887, in Section five, *supra*, specifically provides that in order to acquire any rights thereunder, the purchaser from the railroad company must be *bona fide*. To be a bona fide purchaser within the purview of this provision, it is necessary that the purchaser acquire the land at a time when they are "public lands in the statutory sense and free from individual or other claims."

See *United States vs. Winona R. R. Co.* (1896), 165 U. S., 463,

where the court, speaking through Mr. Justice Brewer, said, in considering the act of March 3, 1887 (page 481):

> "Our conclusion is that these Acts operate to confirm the title to every purchaser from a railroad company of land certified or patented to or for its benefit notwithstanding any mere errors or irregularities in the proceedings of the land department and notwithstanding the fact that the lands so certified or patented were by the true construction of the land grants, although within the limits of the grants, excepted from their operation, providing that he purchased in good faith, paid value for the lands, and, *providing also that the lands were public lands in the statutory sense of the term and free from individual or other claims.*" (Italics ours.)

Therefore, unless the lands in controversy were "public lands in the statutory sense, and free from individual or other claims" on April 5, 1871, when the deed from the railroad to Langston was made, neither Langston nor his successors in title could acquire any right to purchase the land under the provisions of the act of March 3rd, 1887. The situation meant to be alleviated by this act never existed in respect to the land which Mrs. Krueger bought. It is not the case where land had not passed to the railroad on account of existing rights and the railroad made a conveyance *after* those rights had expired, which was the situation which the act of 1887 was plainly intended to meet, but on the contrary, in the instant case, the railroad attempted to convey the land before it had a right to assume any rights to convey. The land did not belong to the railroad at that time, nor did it have any color of right to sell it, because it was expressly excepted from their grant by Woodward's application. The land was clearly not "public land in the statutory sense" and Woodward's valid filing prevented it from being "free from individual or other claims." That being true, Langston was not a *bona fide* purchaser within the meaning of the act and was consequently entitled to no rights or privileges under such act.

It is submitted, therefore, that Benson had no more right to purchase the land under the act of 1887 than his predecessor in interest and consequently that the said Benson was at the time of the purchase of the patent by Mrs. Krueger, at most only a squatter on the land, without any legal or equitable rights other than his rights against his grantor under his warranty deed.

POINT IV.

The original affidavits to the effect that the land was not already occupied in reliance upon which the patent was issued were not false, because a mere trespasser is not an "adverse occupant" within the meaning of the Land Office requirement.

The findings of fact by the trial court include the circumstance that Benson's agents were in possession of the land at the time the affidavits were made and the patent issued. If such possession can be considered as an adverse occupancy within the purview of the land office requirement, the affidavits were false; if such possession cannot be so considered, they are true.

The defendant submits that a mere trespasser or squatter is not an adverse occupant.

The alleged fraud is said to consist of an affidavit by the patentee, William E. Moses, that the land was, on September 2, 1909, unoccupied, unimproved, and unappropriated, although he included in the same affidavit the statement that he was not well acquainted with the character of the land and had not personally examined the same. Certainly no person can claim to have relied upon, or been deceived by, an affidavit qualified in that manner. Such assertion is not positive or made as of Moses' own knowledge. It was not such a statement of fact as any person could complain of, if he saw fit to rely upon it.

The only other ground of fraud relied upon is claimed to be the statement in the affidavit of John A. McIntyre that the land on September 2, 1902, was

"not in any manner occupied adversely to the selector." To show such falsity of this statement, it was incumbent on the government to show by clear and convincing proof that the land was occupied adversely to the applicant.

The paragraph of Circular, February 21, 1908 (36 L. D., 278, 279), requiring showing by selector is as follows:

> "1. The location or selection must be accompanied, in addition to the evidence required by existing rules and regulations, by the affidavit of the locator, selector, or some credible person possessed of the requisite personal knowledge of the premises, showing that the land located or selected is *not in any manner occupied adversely to the locator or selector.*"

The fraud complained of here is an alleged false statement of a fact, on account of which the patent of the United States is to be canceled.

> See *Wright-Blodgett Co. vs. U. S.*, 236; U. S., 397, at page 403.

> "In such case, the respect due to a patent, the presumption that all the preceding steps required by the law had been observed before its issue, and the immense importance of stability of titles dependent upon these instruments, demand that suit to cancel them should be sustained only by proof which produces conviction."

The language of the Land Office requirement is not that the selector should show that no one *claimed* the land adversely to the selector. But we are not concerned with what might have been required, or

was not done by the selector, or someone for him, but only with the truth or falsity of the statement of "occupancy adverse" to the selector on September 2, 1909.

Occupancy must be adverse to the locator or selector. We submit that this must be an occupancy based on some actual right, and that a mere trespasser or squatter should not be treated as an adverse occupant.

There was no showing, either in Benson's alleged possession or in his alleged record title, to which that possession is said to refer, nor is there a showing in the complaint or proof in this case, that Benson was upon the land at any time in other right than as a trespasser, intruder, or squatter on this land.

The whole argument and theory of appellant is based on the contention that Benson had a real, substantial right and equity in this land under the act of 1887, based on his grantor's purchase of the railroad grant lands, which came to him by mesne conveyances, and that therefore his occupancy was adverse to the selector.

On the date when affidavit was made, Benson did not occupy or dwell upon the land. The most he claims is that he had put some improvements on the land prior to that date; that the man who cultivated the land lived on an adjoining farm; that he does not show anyone on the land at that date; that the crop did not fully materialize that year and that the weeds took part of it.

McIntyre testifies (folios 52-53):

"When we came to file on it I went to examine the land. Prior to that was quarrying above

> the land and used the road to go by the land. Never saw a person there. A shack was there. There was a broken down fence and a dug out barn. We were informed that Benson claimed the land."

Warner testified that the land was not occupied in 1909, and that there was no cultivation, to amount to anything, upon it (folio 57).

Benson was notified by Krueger in 1907 that "his title is imperfect," but he and his grantors during all this time made no attempt to get this land.

If this were a suit by Benson to recover the premises from Mrs. Krueger, his claim would be denied by the case of *San Jose Land and Water Co. vs. San Jose Ranch Co.*, 189 U. S., 177, 184, in which the court said:

> "There is no evidence that the original grantees from the railroad company, or their successors in interest, ever sought to take advantage of the act of 1887, or ever applied to purchase the lands, or made payment to the United States, or did anything whatever before the beginning of this suit to indicate that they relied upon this statute. We agree with the Supreme Court of California that the plaintiff was not entitled, upon the showing of a mere right to purchase, to demand that its title be adjudged good and valid, and that the defendant had no estate or interest in the land, or that it should be enjoined from asserting any claim adverse to the plaintiff, or that it should recover possession of the land, with the right of ousting the defendant from the improvements which its predecessors had made thereon. An inceptive right under the statute was an insufficient basis of recovery. A party cannot rest forever on such a right, but is re-

quired by the statute, before asserting it against innocent third parties, to take some steps to perfect it."

We contend, therefore, that the land was not occupied adversely to defendant's grantor on September 2, 1909.

POINT V.

The judgment and decree appealed from should be reversed and the original bill of complaint should be dismissed.

Respectfully submitted,

WILLIAM V. HODGES,
RICHARD B. SCANDRETT, JR.,
Counsel for Emma T. Krueger.

In the Supreme Court of the United States.

OCTOBER TERM, 1917.

EMMA T. KRUEGER, *Appellant*,
v.
THE UNITED STATES.
No. 111.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The appeal of Emma T. Krueger, allowed February 3, 1916 (R. 56), is from a decree of the Circuit Court of Appeals for the Eighth Circuit, entered November 15, 1915 (R. 55), reversing a decree of the District Court for the District of Colorado, entered October 10, 1914 (R. 9), which dismissed the Government's bill of complaint, filed April 27, 1914 (R. 1).

Opinion, C. C. A. (R. 49), 228 Fed. 97.
Opinion, D. C. (R. 42–44).

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The bill sought the cancellation of a patent for 80 acres of public land in Colorado issued to William E. Moses June 6, 1910, upon a soldiers' additional homestead entry by assignee under the Revised Statutes (§§2306, 2307) and the Act of August 18, 1894 (28 Stat. 397), and also the cancellation of conveyances of the land to the appellant Emma T. Krueger. The alleged ground for relief was that the entry had been made and the patent secured by means of false affidavits, one by the selector and entryman Moses who swore in his application dated September 2, 1909, that the land was unoccupied, unimproved and unappropriated by any person other than himself, and another affidavit by John A. McIntyre, which accompanied the application, who swore that the land was not in any manner occupied adversely to the selector, whereas in truth the land was at the time of the entry and for several years previously had been in the open and notorious possession of one Perry C. Benson, under apparent title deraigned from the Denver Pacific Railway and Telegraph Company, which Company claimed under a land grant of Congress made July 1, 1862, all of which was well known to the entryman Moses and the witness McIntyre. It was also alleged that the fraud was perpetrated pursuant to a prior agreement between the entryman Moses and one Charles M. Krueger, the husband of defendant Emma T. Krueger, and that Mrs. Krueger took the conveyance through Moses

and her husband with notice of the fraud and without consideration (R. 1–3).

The answer denied the fraud, alleged that the land was in fact unoccupied, unimproved, and unappropriated by any person and not occupied adversely to Moses at the time of the entry, and that the defendant was a purchaser in good faith without notice of the alleged fraud (R. 5–8).

The District Court found that the patent had been obtained by fraud as alleged in the bill, but found in favor of Mrs. Krueger upon the ground that the Government failed to show that she purchased with knowledge of the fraud (R. 42–44). The Court of Appeals concurred in the finding of fraud and reversed the decision of the District Court on the ground that "as the burden of proof rests upon the defendant to make out the defense of innocent purchaser, . . . Mrs. Krueger, at the time she purchased, must be held to have had constructive notice of facts which if investigated would have led to a knowledge of the fraud" (R. 51, 55).

The tract in controversy is part of an odd numbered section lying within the primary limits of the grant of July 1, 1862 (12 Stat. 489, 493), to the Leavenworth, Pawnee and Western Railroad Company, to which grant the Denver Pacific Railway and Telegraph Company succeeded under the Act of March 3, 1869 (15 Stat. 324). On April 13, 1866, before the definite location of the road which

occurred August 20, 1869, the land was preempted under the Act of September 4, 1841 (5 Stat. 453, 455), by one Robert W. Woodward, whose preemption claim was subsisting and valid at the time of the railroad location and up to July 14, 1872, at which time the claim expired for failure to make final proof and payment (Stipulation, R. 27–28).

On April 5, 1871, the railroad company deeded the land to James Langston, through whom the land passed by various mesne conveyances and upon an apparently regular abstract of title to Perry C. Benson on April 6, 1904 (Abstract of Title, R. 28). Benson paid $1,375 cash for the land, relying upon the abstract of title. The land was then rough and unimproved, with the exception of about 5 acres in cultivation, a fence around most of it and a house which was occupied. Benson proceeded to improve the land by removing timber and rocks, grading down ridges, constructing irrigation ditches, moving the house and barn, building a cistern, hen house and cave, and placing nearly all of it under irrigation and cultivation. These improvements were all on the land in the spring of 1909 before the entry of Moses and are still there. The land was cultivated and occupied by Benson or his tenants during the years 1906 to 1910, and ever since has been so cultivated and occupied by his tenants. During the farming season of 1909 the tenant who cultivated the land lived on an adjoining farm. Benson has paid the taxes on the

land since his purchase, and the conveyance to him together with his chain of apparent title from the railroad company has been of record since 1904 (R. 22–27, 38–39, 40–42).

On August 3, 1907, Charles M. Krueger wrote to Benson as follows (R. 24):

> Upon a search of the records, I find that you are the present owner of the W/2 NE/4, Sec. 17, Tp. 5 N, R 69 West of the 6th P. M. [the tract in controversy], and that the title thereto is imperfect. If you are sufficiently interested, I would be pleased to correspond with you relative to the matter and assist you in curing the defect.
>
> My charges will be reasonable.

Benson did not know Krueger, had never heard of him, and paid no attention to his letter (R. 24, 25). Krueger, the husband of the appellant, had been chief clerk in the United States land office at Denver for many years (R. 19, 30) and after February 12, 1907, practiced as a land and mining attorney before the Denver land office and the General Land Office (R. 30). Krueger and McIntyre had adjoining offices (R. 37-38) and they were interested together in this tract (R. 40). They both knew that Benson claimed the land under the railroad grant and Krueger told McIntyre about the letter he had sent to Benson in 1907 (R. 40).

The entryman Moses was engaged in the land scrip business (R. 13). He procured the soldiers' additional homestead assignment on which this en-

try was made and made the entry at the request of Krueger, whom he had known as a clerk in the land office for probably twenty-five years. " The entire transaction was for Krueger who had bought the scrip " from Moses for $780 (R. 19). Moses deeded the land to Krueger without further consideration. " The oral understanding between him and Krueger at the time he sold Krueger the scrip was that such deed would issue when patent issued " (R. 20). Moses " never saw the land " (R. 19, 20), and " never claimed any interest in the land " (R. 20).

The application to enter was sworn to by Moses before the Register of the local land office September 2, 1909 (R. 16), in the approved departmental form and contained the statement, in reference to the scrip: " that I purchased same in good faith and am now the holder and owner thereof " and that " I have not sold or disposed of said right of entry but that the same is vested in me unimpaired "; and in reference to the land: " that the land . . . is unoccupied, unimproved, and unappropriated by any person claiming the same other than myself " (R. 15). The corroborating affidavit of McIntyre, also in approved departmental form, contained the statement: " that said land . . . is not in any manner occupied adversely to the selector " (R. 18).

The receiver's receipt was issued to Moses April 8, 1910; Moses conveyed by warranty deed to Krueger April 15, 1910; Krueger conveyed by war-

ranty deed to Mrs. Krueger and Mrs. McIntyre, each an undivided one-half interest, April 22, 1910; the patent was issued to Moses June 6, 1910; and Mrs. McIntyre conveyed her half interest by warranty deed to Mrs. Krueger April 22, 1913 (R. 28, Abstract, R. 30, 31, 42).

On July 5, 1910, a notice was posted on the land forbidding any trespassing thereon, signed: "Emma T. Krueger and Mary N. McIntyre, owners, By John A. McIntyre, their agent" (R. 24). This notice was posted on the land at the request of McIntyre (R. 41, 42). Benson tore off the notice and then went to Denver to get legal advice (R. 24, 25).

Mrs. Krueger testified that, at the time of the execution of the deed by her husband to her and Mrs. McIntyre (April 22, 1910, one week after the date of the final receipt and six weeks before the date of the patent to Moses), she paid him $400 for an undivided half interest, and on April 22, 1913, the date of the deed to her from Mrs. McIntyre, she paid Mrs. McIntyre $1,500 for her half interest (R. 31); that the $400 paid to her husband was in cash (R. 34) and the $1,500 paid to Mrs. McIntyre was by check, which she identified (R. 31). She further testified that the "first time she saw this land was on March 27, 1913" (R. 31), and that she "knew nothing about any statement which may have been made in the application signed by William E. Moses for this land, or the affidavit of J. A. McIntyre in connection with this application, or

whether or not such statement was true or false in any particular " (R. 32).

On cross-examination, her attention was called to an article published in the Denver Post about the time of the issuance of the patent, which gave a fair account in the usual newspaper style of the whole transaction, particularly mentioning the purchase by Benson from the railroad company, the letter of Krueger to Benson suggesting a defect in his record title, the arrangement between Krueger and McIntyre " that the two file on the land," which they did " by the placing of ' scrip ', the customary process," thus gaining the patent (R. 35-36). Mrs. Krueger admitted that she heard " different ones " talk about this article at the time; that it was " public talk " (R. 33); that she saw it, but " didn't read it through " (R. 34). She testified: " It was called to my attention. Some one cut it out of the paper down town and sent it to me " (R. 34). When the newspaper clipping was read at the trial, the court remarked: " I will not pay the slightest attention to that in the consideration of this case " (R. 35). The clipping was not, however, excluded; there was " no objection at all " (R. 34).

Mrs. Krueger also testified positively that she went to the land on Easter Sunday, March 27, and again about April 7, 1913, two weeks before she purchased the half interest of Mrs. McIntyre, that on the second trip she found people in the house and this occurred: " A lady came out and I asked her

who was there, and she said that her name was Benson; and I said: 'Are you Mrs. P. C. Benson?' She said 'No,' that P. C. Benson was her father-in-law; that her husband and she were there to do farming" (R. 32).

The Act of March 3, 1887 (24 Stat. 556), for the adjustment of railroad land grants, provided (§5):

> That where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the bona fide purchaser thereof from said company to make payment to the United States for said lands at the ordinary Government price for like lands, and thereupon patents shall issue therefor to the said bona fide purchaser, his heirs or assigns.

Regulations promulgated by the Land Department on February 13, 1889, for carrying out the Adjustment Act of 1887, provided with reference to section 5 (8 L. D. 348, 352):

> No entry will be allowed under this section until it shall have been finally determined by this Department that the land was excepted from the grant.

And again on August 30, 1890 (11 L. D. 229):

> If the applicant is not the original purchaser from the company it is immaterial what the qualifications of his immediate grantor or the intervening purchasers may have been.

Regulations promulgated February 21, 1908, to govern applications to exercise soldiers' additional homestead rights by assignee, provided (36 L. D. 278):

> The location or selection must be accompanied, in addition to the evidence required by existing rules and regulations, by the affidavit of the locator, selector, or some credible person possessed of the requisite personal knowledge of the premises, showing that the land located or selected is not in any manner occupied adversely to the locator or selector.

The Questions Presented.

The propositions advanced in behalf of the appellant in support of the assignment of errors may be reduced to two, namely: (1) That the patent was not obtained by fraud, and (2) that the appellant is a bona fide purchaser without notice of the fraud.

We maintain the contrary of both these propositions.

ARGUMENT.

I.

The Patent Was Obtained by Fraud and Perjury.

Upon the issue of fact involved in this conclusion the decisions of both lower courts are concurrent (R. 42, 49), and the evidence in the record admits of no other finding.

The entryman, Moses, never saw the land and had no interest in it. He was acting for Krueger under a prior agreement to obtain the land for him (R. 19–20), and soon after the issuance of the receiver's receipt he deeded the land to Krueger accordingly (Abstract, R. 28). Yet Moses swore in his application that he was the owner and holder of the scrip, that he had not sold or disposed of the right of entry thereunder, and that the land was unoccupied, unimproved and unappropriated by any person claiming the same other than himself (R. 15), well knowing, as he testified, that without this affidavit his application would have been rejected (R. 21).

Krueger and McIntyre were jointly interested in procuring this land through Moses (R. 40). Krueger procured McIntyre to make the supporting affidavit (R. 20), which accommodation on the part of McIntyre apparently was the basis of his half interest. They both knew at the time, as McIntyre testified, that the land was claimed by Benson under an apparent chain of title from the railroad

company. Krueger had sent a letter to Benson two years before showing his knowledge of that fact (R. 24) and had told McIntyre about it (R. 40). McIntyre had also been to the land and seen Benson's improvements on it, and a gentleman living next door told him that Benson claimed the land (R. 38–40). Yet he swore in support of Moses' application that the land was not in any manner occupied adversely to Moses (R. 18).

It is contended for appellant as a matter of law that these affidavits were not false because Benson was a mere trespasser on the land and so could not be an adverse occupant. Whether Benson was a good faith occupant or a trespasser was a matter for determination by the Land Department, not by the applicant or his sustaining witness. To enable the Department to make such determination it established regulations which required sworn testimony, as a condition to the allowance of the entry of Moses, that the land was " not *in any manner* occupied adversely to the locator or selector " (36 L. D. 278). If the claim and occupancy of Benson had been made known, the application of Moses would have been rejected and Benson would have been notified and given an opportunity to assert a preferential right to purchase the land under the Act of March 3, 1887 (24 Stat. 556, §5), and the regulations established in execution of that Act. 8 L. D. 348, 351, 352; 11 L. D. 229; *Miller* v. *Tacoma Land Co.*, 29 L. D. 633, 635; *United States* v. *Southern Pacific*

Railroad Co., 184 U. S. 49, 58; *Logan* v. *Davis*, 233 U. S. 613, 629. What the Land Department might have determined as to Benson's right, or might now determine if it had the opportunity, is beside the present issue. It had full jurisdiction over that subject, in aid of which a showing by Moses of *any* adverse occupancy was required, and this jurisdiction it was prevented from exercising by the false affidavits of Moses and McIntyre which induced the patent.

II.

The Appellant Is Not a Bona Fide Purchaser for Value.

The District Court was wrong (R. 42–44) and the Court of Appeals was right (R. 51, 55) upon the question of the burden of this issue. A bona fide purchase for value is a perfect defense, but it is "an affirmative defense which the grantee must establish in order to defeat the Government's right to the cancellation of the conveyance which fraud alone is shown to have induced." *Wright-Blodgett Co.* v. *United States*, 236 U. S. 397, 403–404, and cases cited.

In addition to the burden resting upon an ordinary purchaser to make this affirmative defense, Mrs. Krueger labored under the further adverse presumption arising out of the community of interest between husband and wife. In the case of a transfer to the wife, operating to defraud the husband's creditors if not made in good faith for

fair value, there is a presumption against her by reason of the community of interest which must be overcome by affirmative proof. *Seitz* v. *Mitchell*, 94 U. S. 580, 582–583. And no reason is perceived why the same presumption upon the same ground should not exist in the case of a transfer which, if not in good faith and for fair value, would operate to defraud the Government.

The sole basis for the claim of purchase for value in good faith by Mrs. Krueger is her testimony that, at the time of the conveyance by her husband to her and Mrs. McIntyre, she paid him $400 for an undivided half interest without knowledge of anything in connection with the land or of the entry of Moses (R. 31, 33).

The entry of Moses was made for the joint benefit of Krueger and McIntyre (R. 40), and a few days after issuance of the receiver's receipt the land was conveyed to Krueger and by him to Mrs. Krueger and Mrs. McIntyre (R. 28, Abstract). Two months later the patent was issued, and within a month thereafter McIntyre, as agent of the two women and in their names, posted a notice on the land asserting their ownership (R. 24, 42). These circumstances strongly indicate that the conveyance to the wives of Krueger and McIntyre was simply a method of division of the land between the two men pursuant to a prior arrangement.

The attitude of Mrs. Krueger, at the time of this conveyance and until she purchased the McIntyre

interest three years later, was one of marked indifference. She knew nothing about the value of the land, had never seen it, sent no one to examine it, and didn't know whether her husband had ever seen it. She didn't go to the land until three years later (R. 31, 33). Two months after her alleged purchase, when her husband received the patent (R. 19, 28, Abstract) he didn't talk to her about receiving it and didn't say anything about it afterwards "particularly" (R. 32). Upon the issuance of the patent a fairly complete story of the whole transaction was published in a newspaper and became a matter of common gossip in the community, as Mrs. Krueger testified (R. 33, 35). Although she saw the published account she "didn't read it through" (R. 34). Evidently she knew the story well, or else she felt that it did not concern her particularly. This is not the attitude of a bona fide purchaser for value.

Mrs. Krueger probably was not an active participant in the fraud of her husband and McIntyre, but the best that can be said of her situation is that she was a passive instrument in the hands of her husband, a public land practitioner of long experience and whom she naturally trusted. The two men conceived and executed the scheme of obtaining a patent for this land through the fraudulent entry of Moses, and then, before issuance of the patent, to cover up their fraud and at the same time effect a division of the proceeds, they caused

the land to be conveyed to their wives. The circumstances do not admit of any other rational conclusion. Although McIntyre and Mrs. Krueger testified and Mrs. McIntyre was not shown to be unavailable, there was no testimony that any consideration passed from Mrs. McIntyre to Krueger. Evidently the consideration for that half interest was McIntyre's necessary assistance in making the fraudulent entry.

The purchase of Mrs. McIntyre's half interest three years later and after the death of Krueger (R. 31) apparently was a real transaction, affected, however, by the previous knowledge which Mrs. Krueger had or should have had when her husband conveyed to her and Mrs. McIntyre. In addition to this, she testified to actual knowledge of Benson's claim and occupancy before the second conveyance. The deed from Mrs. McIntyre was dated April 22, 1913 (R. 31). On April 7, 1913, Mrs. Krueger visited the land, and found a lady at the house who said her name was Benson. Whereupon Mrs. Krueger asked: "Are you Mrs. P. C. Benson?" (R. 32). This shows Mrs. Krueger's knowledge at that time, two weeks before the purchase, that P. C. Benson was claiming and occupying the land.

Conceding that Mrs. Krueger paid her husband $400 at the time of his conveyance to her and Mrs. McIntyre, as she testified, this was not fair value for a half interest in the land. She did not visit

the land and made no inquiry as to its value. Had she done so she would have found that Benson had paid $1375 for the land five years before and had since placed valuable improvements on it (R. 22–23). Three years later, after visiting the land, she herself paid $1500 for Mrs. McIntyre's half interest, and that in the face of an ascertained and active adverse claim (R 31–32). The newspaper story of the transaction which she saw about the time the patent was issued stated that the land was "worth in the neighborhood of $50,000" (R. 35), but she was so little interested that she "didn't read it through" (R. 34).

Mrs. Krueger was bound to take notice of the character of the entry made by Moses, for this appeared on the face of the receiver's receipt, the only evidence of title from the Government at the time of her purchase. *Washington Securities Co.* v. *United States*, 234 U. S. 76, 79. Hence she was bound to know that the entry could not have been made without an affidavit showing at least that the land was " not in any manner occupied adversely " to Moses. 36 L. D. 278. She was charged with notice of Benson's occupancy and the recorded chain of title from the railroad company (R. 28) under which Benson claimed, and also of the Act of 1887 giving a preferential right of purchase to such claimants under departmental regulations. *Ramsey* v. *Tacoma Land Co.*, 196 U. S. 360, 364; *Gertgens* v. *O'Connor*, 191 U. S. 237, 246; *United States*

v. *Southern Pacific R'd Co.*, 184 U. S. 49, 58; *Logan* v. *Davis*, 233 U. S. 613, 629; *Miller* v. *Tacoma Land Co.*, 29 L. D. 633, 635. Hence she was bound to know that the entry could not have been made except upon false testimony. The records of the land office and the papers there on file showed the origin of the apparent title of Moses and the steps which had been taken to obtain it. The exercise of ordinary prudence would have led her to examine those papers, and in law she must be considered as having made such examination. *Brush* v. *Ware*, 15 Pet. 93, 111. A purchaser is charged with notice of every fact shown by the records, and is presumed to know every other fact which an examination suggested by the records would have disclosed. *Northwestern Bank* v. *Freeman*, 171 U. S. 620, 629. She had no right to shut her eyes to these sources of information leading to certain knowledge of the fraud, and then say that she was an innocent purchaser for value. *Simmons Creek Coal Co.* v. *Doran*, 142 U. S. 417, 437.

CONCLUSION.

It is respectfully submitted that the decree of the Circuit Court of Appeals should be affirmed.

FRANCIS J. KEARFUL,
Assistant Attorney General.

DECEMBER, 1917.

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veyances came into, and retained, possession of a parcel of land, which, because of a preëmption filing, was excepted from the grant made to that company (*supra*), was in a position to acquire full title by purchase under the Adjustment Act of March 3, 1887, c. 376, 24 Stat. 556, § 5; and the regulations of the Land Department relative thereto.

One who purchases under a receiver's receipt, issued upon a soldiers' additional homestead entry, land, which is in the actual possession of another claiming from another source under recorded deeds, is constructively notified by such possession and records of that other's claim and of that other's rights as so revealed; and also—through the receiver's receipt—of the origin of his own title and therein of the fact that it was procured by means of affidavits falsely stating that the land was unoccupied, unimproved and unappropriated.

The defense of *bona fide* purchase is affirmative; the burden of establishing it rests upon the party who makes it, in a suit by the United States to cancel a patent for fraud.

228 Fed. Rep. 97, affirmed.

THE case is stated in the opinion.

Mr. William V. Hodges and *Mr. Richard B. Scandrett, Jr.*, for appellant:

A purchaser under a patent is not required to go behind the patent. *United States* v. *Laam*, 149 Fed. Rep. 581. Mrs. Krueger was not bound to hunt for grounds of doubt, and in order to set the patent aside the United States must charge her with notice of the original fraud. *United States* v. *Detroit Timber & Lumber Co.*, 131 Fed. Rep. 668; *United States* v. *Clark*, 200 U. S. 601, 607, 609. If Benson or his tenants were actually in possession of the land at the time of the purchase by Mrs. Krueger, it may be conceded that she is chargeable with notice of such possession, but there is nothing in that circumstance or any inquiry which might be induced thereby, which would give her notice of the alleged fraud upon the United States. Such possession was only notice to Mrs. Krueger of the extent and character of the claim of the possessor himself, not of defects in the title of her predecessor in title. *Suiter*

v. *Turner*, 10 Iowa, 517, 524; 2 Minor, Real Property, § 1413; 2 Pomeroy Eq. Jur., § 615. This rule of law implying notice from an adverse possession was invented in order to protect tenants of a grantor who conveyed property without actually informing the grantees of the leases, or to protect owners of property who had failed to register their deeds. In the case of possession adverse to a grantor, such possession only charges the grantee with knowledge similar to that which he would have had if the adverse possessor had not neglected to register his title. Any right which Benson had was certainly not derived through or from Mrs. Krueger's grantor, and it is submitted that actual notice of Benson's title is of no materiality, for the simple reason that he had no valid title to record. *Burt* v. *Baldwin*, 8 Nebraska, 487, 494; *Roll* v. *Rea*, 50 N. J. L. 264; *Munn* v. *Bergess*, 70 Illinois, 604, 614, 615; *Lloyds* v. *Karnes*, 45 Illinois, 62, 72. She was justified in assuming that the duly executed instrument of the United States was valid, and, since she was an innocent purchaser of such patent for a valuable consideration, the voidable title in the hands of her predecessors becomes absolute in her. *Perkins* v. *Hays*, 1 Cooke (Tenn.), 163, 168, 174; *Phillips* v. *Buchanan Lumber Co.*, 151 N. Car. 519. The most notice that knowledge of any possession by Benson could impute to Mrs. Krueger would be of the facts or circumstances that she might have learned by making inquiry of Benson. *Losey* v. *Simpson*, 11 N. J. Eq. 246, 255; *Runyan* v. *Snyder*, 45 Colorado, 156, 162. So far as she could have learned by inquiry, he was a trespasser and had no rights whatever, and there is no evidence to show that Benson knew that a fraudulent affidavit had been made at the time Mrs. Krueger purchased the land.

The matter to be determined is whether the legal title should remain in Mrs. Krueger, or the patent be canceled and title restored to the United States—not whether the

legal title should go to a third party. To accomplish this result, the Government must establish the fraud by clear and convincing proof. It must be conceded that she had no actual knowledge of the fraud, and there is nothing in the record to indicate that the most diligent inquiries made to Benson himself would have divulged the fact that the patent had been procured by means of false affidavits.

Since there is nothing in the record to show that Langston, the purchaser from the railroad company, was a citizen of the United States, or had declared his intention to become such, or was a *bona fide* purchaser, as provided by § 5 of the Act of March 3, 1887, 24 Stat. 556, the record of Benson's title and his occupancy did not charge Mrs. Krueger with constructive notice of any right of Benson, because the absence of those circumstances prevents Benson from having any valid interest in the said land. *Ramsey* v. *Tacoma Land Co.*, 196 U. S. 360, 362; *Miller* v. *Tacoma Land Co.*, 29 L. D. 633, 634; *Gertgens* v. *O'Connor*, 191 U. S. 237, 241. It is not disputed that the deed from the railroad to Langston was made on April 5, 1871, at a time when the Woodward filing was valid, and at that time the railroad had no right, title or interest in the land. To be a *bona fide* purchaser within the purview of the act, it is necessary that the purchaser acquire the lands at a time when they are "public lands in the statutory sense and free from individual or other claims." *United States* v. *Winona R. R. Co.*, 165 U. S. 463, 481.

The original affidavits to the effect that the land was not already occupied in reliance upon which the patent was issued were not false, because a mere trespasser is not an "adverse occupant" within the meaning of the Land Office requirement.

Mr. Assistant Attorney General Kearful for the United States.

MR. JUSTICE DAY delivered the opinion of the court.

This is an appeal from a decree of the United States Circuit Court of Appeals for the Eighth Circuit reversing a decree of the District Court of Colorado which dismissed a bill of complaint filed by the United States against Emma T. Krueger for the cancellation of a certain patent upon public lands in Colorado.

The Government alleged in its bill that the land, eighty acres, patented to William E. Moses June 6, 1910, upon a soldiers' additional homestead entry (Rev. Stats., §§ 2306, 2307; 28 Stat. 397), had been secured by means of false affidavits, one by the entryman, Moses, who had made oath that the land was unoccupied, unimproved, and unappropriated by any person other than himself; the other by John A. McIntyre that the land was not in any manner occupied adversely to the selector, whereas in truth and in fact the land had been for several years previously in the open and notorious possession of one P. C. Benson under title deraigned from the Denver Pacific Railway & Telegraph Company under a land grant of Congress made July 1, 1862. It was also charged that the fraud was perpetrated by agreement between Moses, the entryman, and one C. M. Krueger, the husband of the defendant, Emma T. Krueger. It is charged in the bill that Mrs. Krueger took the conveyance through Moses and her husband with notice of the fraud and without consideration.

Upon issue joined, and the allegation of the answer that the defendant was a purchaser in good faith without notice of any fraud, the District Court found that the patent had been obtained by fraud, but that Mrs. Krueger was a *bona fide* purchaser without notice, and as such entitled to hold the land. The Court of Appeals took the same view of the evidence as to the fraudulent manner in which the land was acquired, and reached the conclu-

sion that the patent should be set aside for fraud committed against the United States unless the defendant had shown that she was an innocent purchaser without notice.

With some hesitation the Circuit Court of Appeals reached the conclusion that Mrs. Krueger at the time she purchased the land must be held to have had constructive notice of facts which, if investigated, would have led her to the knowledge of the fraud, and that she was not entitled as a *bona fide* purchaser to hold the land as against the Government. (228 Fed. Rep. 97.)

It was stipulated by the parties for the purposes of the trial as follows:

"By Act of Congress of July 2, [1] 1862 (12 Stat. 489), Congress granted to the Leavenworth, Pawnee and Western Railroad Company, a right of way over certain public lands, and also certain public lands to aid in the construction of said railroad. That under and by virtue of a certain Act of Congress of March 3, 1869, the Denver Pacific Railway and Telegraph Company became the owner of and entitled to all the rights and benefits so granted and conferred by said Act of Congress of July 2, [1] 1862, and said company selected and definitely located its said right of way, on August 20, 1869, and so selected and definitely located and fixed its said right of way as to bring the lands involved in this suit within the primary limits of said grant. On April 13, 1866, Robert W. Woodward filed a certain valid pre-emption declaratory statement, numbered 2094, as provided for in the Act of Congress dated September 4, 1841 (5 Stat. 455), for the lands hereinabove described (unoffered lands), upon which final proof and payment was never made, that said declaratory statement was a valid and subsisting claim on August 20, 1869, and all rights under and by virtue of said pre-emption filing of said Woodward expired by operation of law on July 14, 1872, up to which date said filing was a valid and subsisting filing."

The land was part of one of the odd-numbered sections named in the land grant and was opposite the constructed part of the road. April 5, 1871, the Denver Pacific Railway & Telegraph Company sold and conveyed the land to one James Langston. Thence by mesne conveyances the land passed to Perry C. Benson, April 6, 1904.

The pendency of Woodward's filing prevented the title from vesting in the railroad company, for it caused the land to be excepted from the grant. *Kansas Pacific Ry. Co.* v. *Dunmeyer*, 113 U. S. 629.

A copy of the abstract of title showing the chain of title from the Denver Pacific Railway & Telegraph Company to Perry C. Benson was stipulated into the record; the abstract also showing the chain of title to and including the purchase by Mrs. Krueger of one-half interest in the land from C. M. Krueger.

Benson paid $1,375.00 for the land, and both courts found that he was and continued to be in possession of the land with the title of record as stated, and that Mrs. Krueger would be held to have knowledge of his rights, certainly as between herself and Benson. We have no doubt from the facts found that Benson had such possession and occupation of the premises as gave at least constructive notice of the nature and extent of his title. Under the Act of March 3, 1887, 24 Stat. 556, § 5, and the regulations of the Land Department, he would have been entitled upon hearing in the Department to purchase the lands and acquire full title thereto upon complying with the statute. Section 5 of the act, and the regulations of the Land Department are given in the margin.[1]

[1] Sec. 5. That where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any

KRUEGER *v.* UNITED STATES.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 111. Submitted December 20, 1917.—Decided March 4, 1918.

Land, part of an odd-numbered section within the primary limits, but covered by a valid preëmption filing at the date of the definite location of the right of way, was excepted from the grant made to the Denver Pacific Railway & Telegraph Company by the Acts of July 1, 1862, c. 120, 12 Stat. 489; and March 3, 1869, c. 127, 15 Stat. 324. *Kansas Pacific Ry. Co.* v. *Dunmeyer*, 113 U. S. 629.

Upon the facts as found, *held*, that one who under a deed of the Denver Pacific Railway & Telegraph Company and through mesne con-

The turning question in the case is: Was Mrs. Krueger a *bona fide* purchaser in such sense that she can hold the land notwithstanding the fraudulent manner in which it was acquired by the entryman Moses for the benefit of Krueger. That Krueger had actual knowledge of Benson's claim to the premises admits of no doubt. As early as August 3, 1907, Krueger wrote to Benson:

"Upon a search of the records, I find that you are the present owner of the W/2NE/4, Sec. 17, Tp. 5 N, R 69 West of the 6th P. M. [the tract in controversy], and that the title thereto is imperfect. If you are sufficiently interested, I would be pleased to correspond with you relative to the matter and assist you in curing the defect.

"My charges will be reasonable."

Krueger had been chief clerk of the United States Land Office at Denver until February 12, 1907, and thereafter practiced as an attorney in land and mining matters at Denver. Moses procured the soldier's additional homestead right upon which the entry was made, and made the entry at the request of Krueger who had bought the soldiers' additional right from Moses for $780.00. Moses deeded the land to Krueger, and never claimed any interest in it. The Land Department's regulations required

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reason excepted from the operation of the grant to said company, it shall be lawful for the bona fide purchaser thereof from said company to make payment to the United States for said lands at the ordinary Government price for like lands, and thereupon patents shall issue therefor to the said bona fide purchaser, his heirs or assigns.

Regulations promulgated by the Land Department on February 13, 1889, provided with reference to § 5 (8 L. D. 348, 352):

"No entry will be allowed under this section until it shall have been finally determined by this Department that the land was excepted from the grant."

And again on August 30, 1890 (11 L. D. 229):

"If the applicant is not the original purchaser from the company it is immaterial what the qualifications of his immediate grantor or the intervening purchasers may have been."

an affidavit that the land located or selected was not in any manner occupied adversely to the locator or selector. Moses obtained a receiver's receipt upon April 8, 1910; and conveyed by deed to Krueger April 15, 1910. On April 22, 1910, Krueger conveyed to Mrs. Krueger and Mrs. McIntyre, the wife of one who had made a corroborating affidavit also containing the statement that the land was not in any manner occupied adversely to the selector. The patent was issued to Moses June 6, 1910, and on April 22, 1913, Mrs. McIntyre conveyed her one-half interest in the premises to Mrs. Krueger. Mrs. Krueger testified that she paid her husband $400.00 in cash for the undivided one-half interest, and that she paid Mrs. McIntyre $1,500.00 by check for her one-half interest. She testifies that when she bought from her husband after final receipt, and before the patent issued, she had not seen the land and knew nothing about it, and did not in fact see it until March 27, 1913; that she knew nothing about the statements made in the affidavit signed by Moses or the affidavit of McIntyre; that before she purchased the interest of Mrs. McIntyre she had been upon the land and found there a Mrs. Benson, who said that her father-in-law was P. C. Benson, and that she and her husband were farming the land.

But we need not dwell upon any inferences which may arise from the relationship between Mrs. Krueger and her husband and her actual knowledge of Benson's possession, for we think the Circuit Court of Appeals was right in reaching the conclusion that Mrs. Krueger had at least constructive notice of the manner in which the land had been obtained from the Government. If the affidavit of Moses had truthfully stated the possession of Benson, Benson would have had an opportunity to claim his rights under the Act of March 3, 1887, and the regulations of the Land Department. From the receiver's receipt, which was the evidence of title of record when

Mrs. Krueger obtained the deed from her husband, she was bound to know that the land had been obtained upon an affidavit of Moses asserting that the land was not occupied adversely. Under the decisions of this court she was chargeable with notice from Benson's possession, and his record title from the railroad company, that he had a preferential right of purchase under the Act of March 3, 1887. *Gertgens* v. *O'Connor*, 191 U. S. 237, 246; *Ramsey* v. *Tacoma Land Co.*, 196 U. S. 360, 364. Having such notice of the origin of the title under which she had purchased, she was chargeable with notice of the facts shown by the records, and could not shut her eyes to these sources of information and still be an innocent purchaser without notice. This doctrine, often asserted in this court, was summarized in *Ochoa* v. *Hernandez*, 230 U. S. 139, 164, in which it was said: "It is a familiar doctrine, universally recognized where laws are in force for the registry or recording of instruments of conveyance, that every purchaser takes his title subject to any defects and infirmities that may be ascertained by reference to his chain of title as spread forth upon the public records. *Brush* v. *Ware*, 15 Pet. 93, 111; *Simmons Creek Coal Co.* v. *Doran*, 142 U. S. 417, 437; *Northwestern Bank* v. *Freeman*, 171 U. S. 620, 629; *Mitchell* v. *D'Olier*, 68 N. J. Law (39 Vr.), 375, 384; 53 Atl. Rep. 467; 59 L. R. A. 949."

If Mrs. Krueger had used these sources of information she would have ascertained that the Moses affidavit wherein it was stated that the lands were not in any manner occupied adversely was untrue. Constructively she is held to have knowledge of these facts. *Washington Securities Co.* v. *United States*, 234 U. S. 76, 79. And see *Dallemand* v. *Mannon*, 4 Colo. App. 262, 264. The defense of *bona fide* purchaser is an affirmative one, and the burden was upon Mrs. Krueger to establish it in order to defeat the right of the Government to have a cancellation of the patent, fraudulently obtained. *Wright-Blodgett*

Co. v. *United States*, 236 U. S. 397, 403, 404; *Great Northern Ry. Co.* v. *Hower*, 236 U. S. 702.

We agree with the Circuit Court of Appeals that Mrs. Krueger did not sustain the burden of showing that she was a *bona fide* purchaser for value, and under the circumstances shown she had constructive notice of the manner in which the land had been procured from the United States. The Circuit Court of Appeals did not err in holding that the Government was entitled to a cancellation of the patent.

Decree affirmed.

MR. JUSTICE MCREYNOLDS took no part in the consideration or decision of this case.